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Supreme Court, U.S.
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No. 07____

In The

Supreme Court of the United States

STEPHEN C. ROTH, *et al.*,

Petitioners,

vs.

MICHAEL F. GREEN, *et al.*,

Respondents,

ROBERT J. MULHERN, Esq.,

Petitioner.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the circumstances presented in Question I and II, a failure to stay a Federal civil rights case until a parallel state criminal case has concluded grants, the opposing party, an unlimited license to incur attorney's fees and costs which may be required to be paid by the adversary and/or his or her counsel. When, if a stay is granted, as required by the decisions below, very little time, effort, and costs would be expended by attorneys and their clients or even the courts. Thus, a stay not only protects clients' rights to assert their constitutional guarantees, affords them due process, and protects their right to have access to the courts, but also does not discourage attorneys from taking these cases pro bono or otherwise, by not chilling advocacy. Therefore, all attorneys and their clients or unrepresented individuals face the problems presented in the following questions especially if they are not successful in the parallel state case, even though success does not and should not determine whether sanctions should be awarded. The reason is the statute of limitations, now commences at the time of the search and seizure.

Question I:

In search and seizure cases, are the dictates of the Supreme Court in the *Wallace* and *Heck* line of decisions and Tenth Circuit in the *Beck* line of cases violated when the law in the Tenth Circuit is now the statute of limitations does not begin to run for a Federal civil rights case until the conviction in a parallel state criminal case is overturned, instead of at the time of the search and seizure?

Question II:

When a statute of limitations is about to run and the Federal claims are not cognizable in a parallel state criminal case, when all issues would be decided in the state case, and by not staying

the Federal case until the completion of the parallel state criminal case, are the dictates of the Supreme Court in the *Wallace and Deakins* line of decisions and Tenth Circuit in the *Parkhurst* line of cases violated, along with clients' right to be afforded due process and have access to the courts, by awarding sanctions, when a case is required to be stayed and a stay would have eliminated fees and costs?

Question III:

Does a subjective standard, an objective standard, any combination thereof, or another standard apply in order to determine Section 1927 sanctions?

Under the circumstances presented in Question IV, the District Court and Court of Appeals improperly changed Local Rule 7.1A from the plaining meaning of the rule to a substantial compliance test (standard). Local rules may only be changed pursuant to Rule 83. For a new rule or amendment to that rule, public notice and comment are required, along with the consent of a majority of the district judges or by abrogation by the Judicial Counsel.

Furthermore, under the substantial compliance standard, not only any letter filed sometime in the lawsuit, but also even a prior motion, served sometime during the lawsuit, could satisfy the substantial compliance test. The effect of this standard is that if an attorney does not meet and confer on all of the issues and does not certify his or her efforts, the attorney can evade a denial of the motion, after the fact, by just saying that he or she addressed a few of the issues in a prior letter, motion, or other document at sometime in the lawsuit and does not have to address all of the issues, not even the main issue (sanctions). This is an absurd result, a violation of this rule, and not the intent or policy behind the clear and unambiguous language of Local Rule 7.1A. Thus, Local Rule 7.1A is now, as changed,

also unconstitutional.

Question IV:

Whether lower Courts can improperly change and use improper procedure to change Local Rule 7.1A when these changes also violate the intent and policy behind this rule and the effect of which is to violate the U.S. Constitution and, then, use those after-the-fact changes to justify sanctions against attorneys and their clients?

PARTIES TO THE PROCEEDINGS

The petitioners-plaintiffs are Stephen C. Roth and Jean E. Gumeson and another petitioner and also counsel of record is Robert J. Mulhern. The petitioners are not corporations. Thus, there are no parent companies or non-wholly owned subsidiaries to be listed.

The respondents-defendants are State Respondents - Bill Owens and Raymond Slaughter; Cortez Respondents - City of Cortez, Roy C. Lane, Dennis Spruell, and Danny Dufur; Durango Respondents - City of Durango, Al Bell, and Jeff Copeland; Dolores and La Plata Respondents - The Board of County Commissioners for the County of Dolores, Jerry Martin, Tim Rowell, Tom Halper, and Matt Buffington; The Board of County Commissioners for the County of La Plata, Sydney "Duke" Schirard, and Mike Meuer; Montezuma Respondents - Michael F. Green, The Board of County Commissioners for the County of Montezuma, Joey M. Chavez, Sam Hager, Brooks Bennett, and Hugh Richards; and Mountain Village Respondents - Town of Mountain Village, Dale Wood, and Ken Brackett.

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The petitioners, Stephen C. Roth and Jean E. Gumeson, and Robert J. Mulhern, Esq., in propria persona and their counsel of record, respectively petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The United States District Court for the District of Colorado granted the aforementioned respondents' request for attorneys' fees and costs. This ruling was not reported. (APX: 34a, 36a). The United States Court of Appeals for the Tenth Circuit affirmed the decision of the Trial Court. This opinion was published in the case of Roth, *et al.* v. Green, *et al.*, 466 F.3d 1179 (10th Cir. 2006). (APX: 1a). The Panel for the Tenth Circuit denied the Petition for a Panel Rehearing or Rehearing En Banc. (APX: 48a).

JURISDICTION

The jurisdiction of the Supreme Court of the United States is pursuant to Title 28 of the United States Code, Section 1254 and Rule 10 of the Rules of the Supreme Court, along with the Court's supervisory powers. (28 U.S.C. § 1254(1) (West 2006) and Sup. Ct. R. 10). On December 5, 2003, the District Court summarily dismissed the civil rights case. On December 11, 2003, the Judgment was entered. Subsequently, the Court awarded sanctions in the amount of $92,044.77 on June 15, 2004 and February 15, 2005. (APX: 34a, 36a). On December 11, 2006, the United States Court of Appeals denied a Motion for Rehearing or Rehearing En Banc. (APX: 48a). On February 28, 2007, The Honorable Justice Stephen Breyer granted the petitioners' application for a 60 day extension of time. Subsequently, the petition was filed on May 9, 2007.

RELEVANT PROVISIONS INVOLVED

FIRST AMENDMENT (U.S. CONST. amend. I). (APX: 51a).

FIFTH AMENDMENT (U.S. CONST. amend. V). (APX: 51a).

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STATEMENT

A. Procedural History

On June 14, 2000 and June 15, 2000, more than twenty six (26) law enforcement officers from at least seven (7) different agencies, from three (3) different cities or towns and three (3) different counties, establish and executed a so called ruse checkpoint, which was in actuality an unconstitutional drug checkpoint, approximately five to six miles North of Rico, Colorado. As a result of this checkpoint, Stephen C. Roth and Jean E. Gumeson were arrested. Mr. Roth was found guilty of a Class 2 petty offense for possession of drug paraphernalia. Ms. Gumeson pled nolo contendere to the charge of littering. Robert J. Mulhern is a sole practitioner, who was employed by Stephen C. Roth and Jean E. Gumeson on a pro bono basis, not only for the parallel state criminal case, but also for the associated Federal civil rights case.

In the parallel state criminal case, the Colorado District Court, Court of Appeals, and Supreme Court were deciding whether the Rico, Colorado Operation was an unconstitutional drug checkpoint and what test to be applied to this operation - if a checkpoint, the Brown test and, if not, then reasonable suspicion or probable cause. These were issues of 1st impression. This parallel state criminal case proceeded until October 12, 2004 when the Supreme Court of the United States denied the Petition for a Writ of Certitiori.

On June 12, 2002, counsel also filed a Federal civil rights action on behalf of his clients, Stephen C. Roth and Jean E. Gumeson, in the District Court for the District of Colorado. On December 5, 2003, the District Court summarily dismissed this case. Subsequently, the Court awarded sanctions, in the amount of $92,044.77, pursuant to Section 1927 on June 15, 2004 and February 15, 2005.

On October 30, 2006, the Court of Appeals for the Tenth Circuit affirmed this decision. (APX: 1a). The aforementioned sanction orders and decision are being sought to be reviewed by the petitioners. On December 11, 2006, the Panel denied the Petition for a Panel Rehearing or Rehearing En Banc. (APX: 48a). On February 28, 2007, The Honorable Justice Stephen Breyer granted the petitioners' application for a 60 day extension of time in which to file a petition for a writ of certiorari. Subsequently, the petition was filed on May 9, 2007.

B. Statement of Facts

When a Federal civil rights case has a parallel state criminal case associated with it, according to decisions of the Supreme Court and Tenth Circuit, district courts are required to stay the civil rights case, until the state criminal case terminates which did not occur in he present case. These contentions are

especially true considering the statute of limitations was about to run for the civil rights case; the Federal claims were not cognizable in the parallel state criminal case; the state court would have decided all of the issues; the District Court's duty to exercise jurisdiction; judicial economy, maintaining federalism, and comity; and, with a stay, very little time, effort, and costs would have been expended by anyone and would have provided due process and allowed the petitioners access to the courts. What would Mr. Roth and Ms. Gumeson, or any client for that fact, have done, if they were successful in the parallel state criminal case? After any premature dismissal, now clients have no recourse, without a stay.

Furthermore, attorneys and their clients are now being sanctioned for doing their job by protecting their clients' constitutional guarantees and requesting changes in the law, especially when the issues are issues of 1st impression and/or there is no law, very little law, or the law is in a flux as in the present case. These issues should be tested by the principals of due process and the adversarial process, not by just the word of adversaries and not by summary dismissals. Thus, all attorneys and their clients face the problems in this case, especially if they are not successful in the parallel state case, even though success does not and should not determine whether sanctions should be awarded. The reason is the statute of limitations, now commences at the time of the search and seizure.

Therefore, inequities exist in cases where there is a parallel state criminal case, proceeding along with a civil rights case. One inequity occurs when the statute of limitations is about to run as in the present case. This inequity was recently resolved by the Supreme Court, in the Wallace case. In Wallace, the Supreme Court held that the statute of limitations begins to run at the time of the arrest and search.

Whereas, the Court of Appeals for the Tenth Circuit and District Court for the District Court of Colorado held that the statute of limitations commences only after the conviction in the parallel state criminal case is overturned, instead of at the time of the search and seizure. Thus, a primary reason for the Court awarding sanctions was the civil rights case was prematurely filed.

Neither Section 1927 Sanctions nor any other sanctions should be awarded on clearly an erroneous view of the law.[1] This view is contrary to the Tenth Circuit Beck decision, which still is present today, and Heck and now Wallace decisions of the Supreme Court. Thus, this was not and is not the law in the Tenth Circuit. Now, according to the Supreme Court this was not and is not the law of the land. Therefore, counsel had to and for that fact all attorneys would of had to and are now required to file civil rights cases or commit malpractice and face charges by the state bar, since the

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[1]As discussed in more detail in Point III on page 23, the Courts also had an erroneous view as to Local Rule 7.1A. The District Court and Court of Appeals improperly changed Local Rule 7.1A from the plaining meaning of the rule to a substantial compliance test (standard). Since the respondents did not state or certify their efforts, to meet and confer on all issues, in their motions for sanctions, the motions should not have even been considered by the District Court, but denied. All an attorney has to say now is that he or she addressed one or two of the issues, sometime during the lawsuit, with the non-moving counsel. The attorney does not even have to certify his or her compliance. Thus, sanctions should not be awarded when a change occurred in the middle of or at the end of a case, especially considering the change was by improper procedures.

Furthermore, an informal Rule 11 warning letter, sent to any attorney up to 11 months before a motion for sanctions is served, does not give notice to counsel that the letter is an attempt to meet and confer, as to all issues, pursuant to Local Rule 7.1A. Since the procedures to change Local Rule 7.1A were not followed, notice was also not provided as to the changing of this rule from its plain language to a substantial compliance standard.

Federal claims were not cognizable in the parallel state criminal case and the statute of limitations was about to run.

Therefore, in the present case, in order to keep time, effort, and costs down in the civil rights case, counsel requested three (3) stays. One as to discovery which was granted by the District Court for the District of Colorado. Two (2) other stays, as to the civil rights case itself, until the parallel state criminal case was completed. Even though the District Court was required to stay the civil rights case as dictated by the Supreme Court in the Deakins line of cases and Tenth Circuit Parkhurst line of cases, the District Court denied these stays. If a stay was granted, as required, very little time, effort, and cost would have been expended by the attorneys in this case or even the Courts.[2]

Thus, a stay was appropriate to not only conserve judicial resources (Colorado River Doctrine), but also to maintain federalism and for comity (Abstention Doctrine), that is, to respect federal-state relationships. These doctrines are contingent on keeping the Federal forum available to parties, when the state forum may be or is inadequate as in the present case. Only a stay ensures that United States district courts satisfy their "virtually unflagging obligation" to exercise its jurisdiction.

However, now, after the Wallace decision another inequity has evolved. The problem is, as occurred in the present case, after a case is filed and if a district court does not stay the

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[2] Additionally, Section 1927 sanctions require a subjective state of mind not an objective one and the proceedings must be multiplied. When attorneys request a stay, neither a subjective nor even an objective state of mind cannot and does not multiply the proceedings. In the present case, because of the erroneous view of the law by the Courts and respondents, the respondents multiplied the proceedings, not the petitioners or their counsel.

case, as required, until the parallel state case completes the appellate process, attorneys and their clients now face prevailing party awards and/or sanctions in excessive amounts, in addition to paying their own attorney's fees and costs; attorneys and their clients face possible financial ruin in having to pay the adversaries attorney's fees and costs; attorneys face possible malpractice actions from their clients; attorneys face possible state bar charges; and attorneys face possible disbarment by the state bar, district court, and court of appeals for not being able to pay attorney's fees and costs. Something is wrong here, especially considering that a stay would eliminate just about all time, effort, and costs, including attorney's fees and costs. In cases of 1st impression, as is the present case, this is especially important because it is impossible to know how a state court will decide the case.

Thus, a stay of a Federal civil rights case allows the parallel state criminal case to proceed to completion, allows the state case to decide the issues, and allows a district court to recognize the state court decision and keep the Federal forum open. If the Supreme Court would have ascertained that the checkpoint in question was unconstitutional, any decision by the Supreme Court would have been certainly binding on the Court of Appeals and District Court. A decision by the Colorado courts, in favor of the petitioners, would have also been binding on these Courts pursuant to the Doctrine of Comity and Offensive Collateral Estoppel. Under the Full Faith and Credit Clause and Title 28 of the United States Code, Section 1738, the respondents would have been collaterally estopped (Offensive Collateral Estoppel) from re-litigating the constitutionality of the checkpoint at issue, if this checkpoint was determined to be unconstitutional.

Therefore, with a stay, if a plaintiff is successful in a parallel state criminal case, the plaintiff will continue the civil rights case. If a plaintiff is unsuccessful, the plaintiff will dismissed

the civil rights case. A stay protects all parties and their attorneys' interests, even the courts. Again, if a stay is granted, as required, very little time, effort, and costs are expended by the attorneys or even the courts, if any.

However, without a stay, defense counsel have an unlimited license to accrue attorney's fees and costs without any checks and balances. If a plaintiff is not successful with his or her parallel state criminal case, under the present circumstances, it is almost automatic that attorney's fees and cost will be awarded to the defendants in the civil rights case, especially in the District of Colorado and Tenth Circuit. Without a stay, defense counsel and their clients just keep on accruing attorneys' fees and costs. Defense counsel even wait until the end of the case to file their motions for sanctions. Defense counsel and their clients do not have any incentive to stay a case. In most instances, they are paid by their insurance company.

Therefore, in the present case and in any case, the State of Colorado had a right to decide the constitutionality of the Rico, Colorado Operation without any interference by the District Court. Mr. Roth also had a right to defend himself against the state criminal charges, without interference from the District Court and without the threat of or institution of sanctions against him, Ms. Gumeson, or his counsel, if the petitioners proceeded with the civil rights case. However, by just a stroke of the pen, the District Court still signed a dismissal order without discovery and without a trial on the issues and, at the same time, decided the constitutionality of the Rico, Colorado checkpoint. The civil rights case did not even proceed past the pleading stages.

Furthermore, the petitioners had a right to be afforded due process and have access to the courts in order to defend their constitutional guarantees. The state criminal court was

deciding all of the issues that were presented to the District Court. Stephen C. Roth did not have a full and fair opportunity to litigate his Fourth Amendment claim until after the trial and appellate process in the state case. Therefore, the District Court, or any court for that matter, should have neither sanctioned counsel nor prematurely dismissed this civil rights case. The appellate process was not completed in the parallel state criminal case of the People v. Roth, 85 P.3d 571 (Colo. App. 2003), until the Supreme Court denied the petition on October 12, 2004. A stay also minimizes the risk of inconsistent legal decisions.

However, now, as it stands, police actions will be immune from some of these civil rights cases and clients are not afforded due process and do not have access to the courts, especially in the District of Colorado and Tenth Circuit. Attorneys and their clients will not want to face these kinds of sanctions, so will not file their civil rights cases. If clients want to go forward, they may be forced to do so without an attorney.

Therefore, only a stay or some other kind of stoppage (equitable estoppel) would prevent these inequities by resolving the aforementioned problems and would prevent the aforementioned improper docket control devices. Due process - fundamental fairness dictates no less.

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT - WALLACE AND HECK AND DEAKINS LINE OF CASES, TENTH CIRCUIT - BECK AND PARKHURST LINE OF CASES, AND OTHER COURTS OF APPEALS AND VIOLATES CLIENTS' RIGHT TO HAVE ACCESS TO THE COURTS WHEN A STAY WAS REQUIRED AND WOULD HAVE ELIMINATED THE ACCRUAL OF FEES AND COSTS.

The Tenth Circuit has entered a decision that is in conflict, on the same important matters, with its own decisions and other courts of appeals and has decided an important question in a way that also conflicts with relevant decisions of the Supreme Court. The Court of Appeals has also entered a decision that has so far departed from the accepted and ususal course of judicial proceedings and has sanctioned a departure by the District of Colorado so as to call for an exercise of the Supreme Court's supervisory powers. (Sup. Ct. R. 10).

Under the present circumstances and by awarding the defendants sanctions, the Courts are stifling the enthusiasm and chilling the creativity that is the very life blood of the law and attorneys. (Oliveri v. Thompson, 803 F.2d 1265, 1268 (2nd Cir. 1986)). Sanctions of $92,044.77 violated Due Process and the Petition Clause, has and will continue to discourage advocacy, and has a chilling effect, on fundamental rights and First Amendment rights, as to clients who would like to protect their constitutional guarantees and have access to the courts (U.S. CONST. amend. I and V and BE & K Construction Co. v. NLRB, 122 S.Ct. 2390, 2395-2402 (2002), and attorneys who would like to take these pro bono cases. When a Federal civil rights case has a parallel state criminal case associated with it, district courts are

required to stay the civil rights case, until the state criminal case terminates.

In the present case and in any case, the State of Colorado had a right to decide the constitutionality of the Rico, Colorado Operation without any interference by the District Court. Mr. Roth also had a right to defend himself against the state criminal charges, without interference from the District Court and without the threat of or institution of sanctions against him, Ms. Gumeson, or his counsel, if the petitioners proceeded with the civil rights case. By just a stroke of the pen, the District Court signed a dismissal order without discovery and without a trial on the issues and, at the same time, decided the constitutionality of the Rico, Colorado checkpoint.[3] The civil rights case did not even proceed past the pleading stages. A docket control device, such as this, violates fundamental fairness. (U.S. CONST. amend. V and Akin v. Q-L Investments, Inc., 959 F.2d 521, 534-535 (5th Cir. 1992)). Thus, the merits of the state criminal case should have been decided by the state criminal court, not the District Court.

Furthermore, petitioners have a right to due process and to access the courts in order to defend their constitutional guarantees. (U.S. CONST. amend. I and V and BE & K Construction Co. v. NLRB, 122 S.Ct. 2390, 2395-2402 (2002)). In the present case, the state criminal court was

[3] Furthermore, the effect of this premature dismissal was also to violate the Rooker-Feldman Doctrine. To justify a dismissal, the District Court analyzed whether the alleged ruse drug checkpoint and the actions of the law enforcement officers were unconstitutional. Thus, as evidenced by the Court's Order to Dismiss, the District Court did review the decision of the District Court for the State of Colorado in violation of the Rooker-Feldman Doctrine. (District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923); and Doe v. E.E. Pringle, 550 F.2d 596, 599 (10th Cir. 1976)).

deciding all of the issues that were presented to the District Court. As Justice Breyer correctly stated, in his dissenting opinion, in the Wallace case, a full and fair opportunity to litigate a Fourth Amendment claim only occurs after the trial and appellate process. (Wallace v. Kato, *et al.*, 549 U.S. ___, No. 05-1240 (2007) and Stone v. Powell, 428 U.S. 465, 494-495, fn. 37 (1976)). Therefore, the District Court, or any court for that matter, should have neither sanctioned counsel nor prematurely dismissed this civil rights case. The appellate process was not completed in the parallel state criminal case of the People v. Roth, 85 P.3d 571 (Colo. App. 2003), until the Supreme Court denied the petition on October 12, 2004. A stay also minimizes the risk of inconsistent legal decisions.

These contentions are especially true considering the statute of limitations was about to run for the civil rights case; the Federal claims were not cognizable in the parallel state criminal case; the state court would have decided all of the issues; the District Court's duty to exercise jurisdiction; judicial economy, maintaining federalism, and comity; and, with a stay, very little time, effort, and costs would have been expended by anyone and would have provided due process and allowed the petitioners access to the courts. What would Mr. Roth and Ms. Gumeson, or any client for that fact, have done, if they were successful in the parallel state criminal case? After any premature dismissal, now clients have no recourse, without a stay, if successful with the state criminal case.

Therefore, attorneys and their clients are now being sanctioned for doing their job by protecting their clients' constitutional guarantees and requesting changes in the law, especially when the issues are issues of 1st impression and/or there is no law, very little law, or the law is in a flux as in the present case. These issues should be tested by the principals of due process and the adversarial process, not by just the

word of adversaries and not by summary dismissals. (U.S. CONST. amend. V).

Thus, all attorneys and their clients face the problems in this case, especially if they are not successful in the parallel state case, even though success does not and should not determine whether sanctions should be awarded. The reason is the statute of limitations, now commences at the time of the search and seizure.

Therefore, inequities exist in cases where there is a parallel state criminal case, proceeding along with a civil rights case. These inequities also caused the conflicts in the law. One inequity occurs when the statute of limitations is about to run as in the present case. Therefore, not only the Tenth Circuit Court of Appeals, but also the District Court for the District of Colorado, had an erroneous view of the law as to when the statute commenced and when to stay a case. These views have created an intra-circuit conflict concerning the Tenth Circuit case of Beck and Parkhurst line of cases and Supreme Court case of Wallace, Heck, and Deakins line of cases. (Wallace v. Kato, *et al.*, 549 U.S. ___, No. 05-1240 (2007); (Heck v. Humphrey, 512 U.S. 477, 487 and fn. 7 (1994); Beck v. City of Muskogee Police Department, 195 F.3d 553, 557-558 (10th Cir. 1999); (Deakins v. Monaghan, 484 U.S. 193, 202-203 and fn. 7 (1988); Parkhurst v. State of Wyoming, 641 F.2d 775, 777 (10th Cir. 1981); and Myers v. Garff, 876 F.2d 79, 81 (10th Cir. 1989)). These views have also created inter-circuit conflicts with other circuit courts.[4]

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[4] **Heck decision** - Nieves v. McSweeney, 241 F.3d 46, 52-53 (1st Cir. 2001); Montgomery v. DeSimone, 159 F.3d 120, 126 (3rd Cir. 1998); Wallace v. City of Chicago, 440 F.3d 421, 427-429 (7th Cir. 2006); Simmons v. O'Brien, 77 F.3d 1093, 1097 (8th Cir. 1996); and Datz v. Kilgore, 51 F.3d 252, 253 and fn. 1 (11th Cir. 1995).

These are actual conflicts recognized by the Supreme Court and corrected by this Honorable Court. Therefore, no attorney or an individual representing themselves should be sanctioned, based on an erroneous view of the law, when circuit courts could not even agree what is proper concerning the Heck and Deakins (stay) cases. The Supreme Court has now even decided these issues in Wallace v. City of Chicago, 440 F.3d 421 (7th Cir. 2006), *Petition for cert. granted*, (U.S. June 19, 2006) (No. 05-1240), and whether a stay was appropriate as discussed below. A decision by the Supreme Court was filed on February 21, 2007. [Emphasis added]. (Wallace v. Kato, *et al.*, 549 U.S. __, No. 05-1240 (2007)).

In the Heck case,[5] the Supreme Court created a general exception for search and seizure cases. The Supreme Court and Court of Appeals for the Tenth Circuit have held that claims arising out of police actions towards a criminal suspect, such as in searches and seizures situations, are presumed to have accrued when the action actually occurred. The Beck court noted that nothing in the Heck case changed the general rule that claims relating to an illegal arrest and search arise at the time of the arrest and search. (Heck v. Humphrey, 512 U.S. 477, 487 and fn. 7 (1994) and Beck v. City of Muskogee Police Department, 195 F.3d 553, 557-558 (10th Cir. 1999)).

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[5] In support of the Heck and Beck cases, the United States Court of Appeals for the Tenth Circuit has confirmed this holding in at least six (6) other cases - Dopp v. Rask, 91 Fed. Appx. 79, No. 03-3150, *available at* 2004.C10.0000077, *¶ 16 (10th Cir. Jan. 27, 2004) (VersusLaw); Hernandez v. Kenny, 208 F.3d 226, 226-228 (10th Cir. 2000); Hall v. Geary County Board of County Commissioners, 12 Fed. Appx. 855, No. 00-3370, *available at 2001.C10.* 0000651, *¶ 12-14 (10th Cir. June 12, 2001) (VersusLaw); Laurino v. Tate, 220 F.3d 1213, 1217 (10th Cir. 2000); Roberts v. Roe, 194 F.3d 1321, 1321-1324 (10th Cir. 1999); and Strepka v. Miller, 203 F.3d 836, 836-838 (10th Cir. 2000)).

As in the Supreme Court case of Heck and Tenth Circuit case of Beck, in the case of Wallace v. City of Chicago, the Court of Appeals for the Seventh Circuit also held that:

> "...attorneys who wish to preserve a claim for false arrest or similar Fourth Amendment violations should file their civil rights action at the time of the arrest." [Emphasis added]. (Wallace v. City of Chicago, 440 F.3d 421, 427 (7th Cir. 2006), *Petition for cert. granted*, (U.S. June 19, 2006) (No. 05-1240)).

In the Wallace case, the Supreme Court affirmed the decision of the Seventh Circuit. Thus, the statute of limitations begins to run at the time of the arrest and search. (Wallace v. Kato, *et al.*, 549 U.S. ___, No. 05-1240 (2007)).

Whereas, in the present case, a primary reason for the Court awarding sanctions was the civil rights case was prematurely filed. More specifically, the Court of Appeals for the Tenth Circuit and District Court for the District Court of Colorado held that:

> "Mulhern assertion that he had to file the complaint to avoid the running of the statute of limitations, and that, in turn, the district court had an obligation to stay the case pending the outcome of Roth's state criminal proceedings, is simply wrong. A plaintiff may not bring a civil rights suit if a favorable result in the suit would necessarily demonstrate the invalidity of an outstanding criminal judgment against the plaintiff. Smith v. Gonzales, 222 F.3d 1220, 1222 (10th Cir. 2000) (citing Heck, 512 U.S. at 487). As correctly noted by the district court, that was precisely the situation here: by asserting that they were the victims of an unconstitutional drug checkpoint, Roth and Gumeson were effectively questioning the validity of

> their arrest and convictions. Thus, to recover damages based on their allegations, Roth and Gumeson were first obligated to prove that their convictions... had been reversed on direct appeal[6], expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a Federal court's issuance of a writ of habeas corpus. (quoting Heck, 512 U.S. 486-87). Not until they successfully did so would their § 1983 claims have arisen. In other words, because their causes of action did not accrue until such time, the applicable statute of limitations did not begin to run until the same time. (quoting Heck, 512 U.S. 489-90). Thus, Mulhern was in no way obligated to file a suit against defendants, and indeed clearly should have waited until such time, if ever, as the Colorado state courts granted relief to Roth and Gumeson from their convictions. " [Emphasis added]. (Roth, *et al.* v. Green, *et al.*, 466 F.3d 1179, 1189-1190 (10th Cir. Oct. 30, 2006). (APX: 19a)

Neither Section 1927 sanctions nor any other sanctions should be awarded on clearly an erroneous view of the law. This view caused an intra-conflict with the Beck decision, which still is present today [Emphasis added], and also conflicts with the Heck and now Wallace decisions of the Supreme Court. Thus, this was not and is not the law in the Tenth Circuit. Now, according to the Supreme Court this was not and is not the law of the land. Therefore, counsel had to

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[6] In light of the fact that the statute of limitations was about to run and the Federal claims were not cognizable in the state case, this is impossible to do, unless the civil rights case was stayed.

and for that fact all attorneys would of had to and are now required to file their civil rights cases or commit malpractice and face charges by the state bar, since the Federal claims were not cognizable in the parallel state criminal case and the statute of limitations was about to run. If counsel did not file this civil rights case for his clients, his clients could have ended up like Wallace and his attorney, who now may be facing state bar proceedings and a malpractice claim. [Emphasis added].

However, in order to keep time, effort, and costs down in the civil rights case, counsel requested three (3) stays. One as to discovery which was granted by the District Court for the District of Colorado. Two (2) other stays, as to the civil rights case itself, until the parallel state criminal case was completed. Even though the District Court was required to stay the civil rights case as dictated by the Supreme Court in the Deakins line of cases as discussed below [Emphasis added], the District Court denied these stays. (Deakins v. Monaghan, 484 U.S. 193, 202-203 and fn. 7 (1988); Parkhurst v. State of Wyoming, 641 F.2d 775, 777 (10th Cir.1981); and Myers v. Garff, 876 F.2d 79, 81 (10th Cir. 1989)). If a stay would have been granted, as required, very little time, effort, and cost would have been expended by the attorneys in this case or even the Courts.[7]

Thus, a stay was appropriate to not only conserve judicial resources (Colorado River Doctrine) (Colorado River Water

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[7] Additionally, as discussed in more detail in Point II on page 22, Section 1927 sanctions require a subjective state of mind not an objective one and the proceedings must be multiplied. (28 U. S. C. § 1927 (West 2006)). When attorneys request a stay, neither a subjective nor even an objective state of mind cannot and does not multiply the proceedings. In the present case, because of the erroneous view of the law by the Courts and respondents, the respondents multiplied the proceedings, not the petitioners or their counsel.

Conservation District v. United States, 424 U.S. 800, 817 (1976)), but also to maintain federalism and for comity (Abstention Doctrine), that is, to respect federal-state relationships. (Younger v. Harris, 401 U.S. 37, 43-46 (1971)). These doctrines are contingent on keeping the Federal forum available to the parties, when the state forum may be or is inadequate as in the present case. (Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 570, fn. 21 (1983)). Only a stay ensures that the district courts satisfy their "virtually unflagging obligation" to exercise its jurisdiction. (Colorado River Water Conservation District v. United States, 424 U.S. 800, 817 (1976) and Deakins v. Monaghan, 484 U.S. 193, 202-203 and fn. 7 (1988)).

In Deakins and its progeny cases, the Supreme Court held that a district court was required to stay Federal claims that were not cognizable in a parallel state court proceeding. This was especially true, if the statute of limitations was about to run. Thus, a District Court has no discretion to dismiss, rather than stay, the claims that cannot be redressed in the parallel state court proceedings. [Emphasis added]. A stay allows a trial court to satisfy its duty to assume jurisdiction. (Deakins v. Monaghan, 484 U.S. 193, 202-203 and fn. 7 (1988); Parkhurst v. State of Wyoming, 641 F.2d 775, 777 (10th Cir.1981); and Myers v. Garff, 876 F.2d 79, 81 (10th Cir. 1989)).

In Wallace v. Kato, the Supreme Court held that, under the traditional rule of accrual, a cause of actions accrues and the statute of limitations commences to run when the wrongful act or omission results in damages. There can be no dispute that the petitioner could have filed suit as soon as the allegedly wrongful arrest occurred, subjecting him to the harm, so the statute of limitations commenced at that time, unless equitable tolling existed, as it did in this case. The petitioner could have filed suit immediately upon his false

arrest. (Wallace v. Kato, *et al.*, 549 U.S. ___, No. 05-1240 (2007)).

The Supreme Court also held that it was in accord with common practice and within the power of a district court to stay the civil action until the criminal case ended. Had the petitioner filed suit and the case was dismissed under Heck, the statute of limitations, absent tolling, would have run by the time that the petitioner obtained a reversal of his conviction. If under those circumstances, the petitioner would not be allowed to re-file his case, Heck would have produced immunity from a Section 1983 action. This result surely was not intended. (Wallace v. Kato, *et al.*, 549 U.S. ___ No. 05-1240 (2007)). However, immunity is also what would have occurred in the present case, if Stephen C. Roth was successful in the parallel state criminal case, or for that fact any other case under these circumstances.

Therefore, not only the majority holding stated a stay was appropriate, but also the dissent all argued that some type of stoppage of the civil rights case was required. Justice Breyer's argument was as to equitable tolling which has the same effect as a stay, that is, stop the civil rights case until the parallel state case is completed. (Deakins v. Monaghan, 484 U.S. 193, 202-203 and fn. 7 (1988); Parkhurst v. State of Wyoming, 641 F.2d 775, 777 (10th Cir.1981); and Myers v. Garff, 876 F.2d 79, 81 (10th Cir. 1989)). This would afford a plaintiff a full and fair opportunity to litigate the Fourth Amendment claim in the state action, including at trial and on direct appeal. (Wallace v. Kato, *et al.*, 549 U.S. ___, No. 05-1240 (2007) and Stone v. Powell, 428 U.S. 465, 494-495, fn. 37 (1976)).

After the Wallace decision, attorneys are now not in a catch-22 as to when to file their case and do not have to play Russian roulette with their clients' constitutional guarantees,

that is, when to file the case in light of the statute of limitations. All attorneys, as did counsel, are now required to immediately file their civil rights case in search and seizure cases.

However, now, after the Wallace decision another inequity has evolved. The problem is, as occurred in the present case, after a case is filed and if a district court does not stay the case, as required, until the parallel state case completes the appellate process, attorneys and their clients now face prevailing party awards and/or sanctions in excessive amounts, in addition to paying their own attorney's fees and costs; attorneys and their clients face possible financial ruin in having to pay the adversaries attorney's fees and costs; attorneys face possible malpractice actions from their clients; attorneys face possible state bar charges; and attorneys face possible disbarment by the state bar, district court, and court of appeals for not being able to pay attorney's fees and costs. Something is wrong here, especially considering that a stay would eliminate just about all time, effort, and costs, including attorney's fees and costs. In cases of 1st impression, as is the present case, this is especially important because it is impossible to know how a state court will decide the case.

Thus, a stay of a Federal civil rights case allows the parallel state criminal case to proceed to completion, the state court case to decide the issues, and allows a district court to recognize the decision of the state court and to keep the Federal forum open. If the Supreme Court would have ascertained that the checkpoint in question was unconstitutional, any decision by the Supreme Court would have been certainly binding on the Court of Appeals and District Court. A decision by the Colorado courts, in favor of the petitioners, would have also been binding on these Courts pursuant to the Doctrine of Comity and Offensive Collateral Estoppel. Under the Full Faith and Credit Clause and Title 28

of the United States Code, Section 1738, the respondents would have been collaterally estopped (Offensive Collateral Estoppel) from re-litigating the constitutionality of the checkpoint at issue, if this checkpoint was determined to be unconstitutional. (U.S. CONST. Art. IV, Sec. 1 and 28 U.S.C. 1738 (West 2006)).

Therefore, with a stay, if a plaintiff is successful in the parallel state criminal case, the plaintiff would continue the civil rights case. If a plaintiff is unsuccessful, the plaintiff will dismissed the civil rights case. A stay protects all parties and their attorney's interests, even the courts. Again, if a stay is granted, as required, very little time, effort, and costs are expended by the attorneys or even the courts, if any.

However, without a stay, defense counsel have an unlimited license to accrue attorney's fees and costs without any checks and balances. If a plaintiff is not successful with his or her parallel state criminal case, under the present circumstances, it is almost automatic that attorney's fees and cost will be awarded to the defendants in the civil rights case, especially in the District of Colorado and Tenth Circuit. Without a stay, defense counsel and their clients just keep on accruing attorneys' fees and costs. Defense counsel even wait until the end of the case to file their motions for sanctions. Defense counsel and their clients do not have any incentive to stay a case. In most instances, they are paid by their insurance company.

Thus, attorneys and their clients are still in a catch-22 and between a rock and a hard place. What attorney or what client would now take one of these cases, especially on a pro bono basis, with a parallel state case, and what client would want to pursue a violation of their constitutional guarantees. Now, clients and their attorneys have to make sure they cannot only pay their attorney's fees and costs, but also, have to make

sure they can pay their adversary's fees and costs. This is impossible to do. A wealthy client cannot afford this, let alone a poor one.

Therefore, now, as it stands, police actions will be immune from some of these civil rights cases and clients are not afforded due process and do not have access to the courts, especially in the District of Colorado and Tenth Circuit. Attorneys and their clients will not want to face these kinds of sanctions, so will not file their civil rights cases. If clients want to go forward, they will be forced to do so without an attorney.

Therefore, only a stay or some other kind of stoppage (equitable estoppel) would prevent these inequities by resolving the aforementioned problems and would prevent the aforementioned improper docket control devices. Due process - fundamental fairness dictates no less.

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH OTHER CIRCUITS AS TO WHETHER A SUBJECTIVE OR OBJECTIVE STANDARD APPLIES TO SECTION 1927 SANCTIONS.

Inter-circuit and intra-circuit conflicts exists as to whether a subjective standard state of mind, objective standard, some combination of both standards, or other standards apply in determining whether Section 1927 sanctions are appropriate. (28 U. S. C. § 1927 (West 2006)). Counsel contends that the proper standard is subjectivity as applied by the Second, Third, Seventh (intra-circuit conflict), Ninth, Eleventh (intra-circuit conflict), and District of Columbia Circuit Courts of Appeals. (Oliveri v. Thompson, 803 F.2d 1265, 1273 (2nd Cir. 1986); Baker Indus., Inc. v. Cerberus, 764 F.2d 204, 208 (3rd Cir. 1985); Suslick v. Rothschild Secs. Corp., 741 F.2d 1000, 1006 (7th Cir. 1984); Optyl Eyewear Fashion

International Corp. v. Style Cos., 760 F.2d 1045, 1048 (9th Cir. 1985), Schwartz v. Millon Air, Inc., 341 F.3d 1220, 1225 -1228 (11th Cir. 2003); and Hilton Hotels, Corp. v. Banov, 899 F.2d 40, 45, fn. 9 (DC Cir. 1990)).

However, the Court of Appeals for the Tenth Circuit and District Court for the District of Colorado applied the objective standard (Braley v. Campbell, 832 F.2d 1504, 1512 (10th Cir. 1987) as also applied by the Fifth, Sixth, Seventh (intra-circuit conflict), Eighth, Tenth, and Eleventh Circuit Courts of Appeals (Intra-circuit conflict). (Cruz v. Savage, 896 F.2d 626, 631-632 & 634 (1st Cir. 1990); Jones v. Continental Corp., 789 F.2d 1225, 1230 (6th Cir. 1986); Lewis v. Brown & Root, Inc., 711 F.2d 1287, 1291-1292 (5th Cir. 1983); Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223, 226-227 (7th Cir. 1984); Perkins v. Spivey, 911 F.2d 22, 36 (8th Cir. 1990); and Amlong & Amlong, P.A. v. Denny's, Inc., 457 F.3d 1180, 1190-1191 (11th Cir. 2006)).

III. THE LOWER COURTS IMPROPERLY CHANGED AND USED IMPROPER PROCEDURE TO CHANGE LOCAL RULE 7.1A, THUS, VIOLATING THE INTENT AND POLICY BEHIND THIS RULE, THE EFFECT OF WHICH ALSO VIOLATED THE U.S. CONSTITUTION AND, THEN, USED THOSE AFTER-THE-FACT CHANGES TO JUSTIFY SANCTIONS.

The Court of Appeals for the Tenth Circuit has entered a decision that has so far departed from the accepted and ususal course of judicial proceedings and has sanctioned a departure by the District Court for the District of Colorado so as to call for an exercise of the Supreme Court's supervisory powers. (Sup. Ct. R. 10). The decision of the Court of Appeals also conflicts - is inconsistent - with and violated the Federal Rules and statutory law - Rule 83 of the Federal Rules of Civil Procedure and Title 28 of the United States Code,

Sections 2071, 2073, and 2077 (FED. R. CIV. P. 83 and 28 U.S.C. §§ 2071, 2073, & 2077 (West 2006) and conflicts with at least nine (9) other decisions in the District of Colorado.[8]

Since local rules have the same force and effect of law and are binding on all parties and all courts, until changed by the appropriate procedure, parties and their counsel have a right to rely upon local rules until changed by that procedure. (Weil v. Neary, 278 U.S. 160, 169 (1929) and Woods Construction Co. v. Atlas Chemical Industries, Inc, 337 F.2d 888, 890-891 (10th Cir. 1964)). Sanctions should not be awarded when rules are changed improperly in the middle of or at the end of a case.

The District Court and Court of Appeals improperly changed Local Rule 7.1A from the plaining meaning[9] of the rule to a

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[8] Hoelzel v. First Select Corp., 214 F.R.D. 634, 635-636 (D. Colo. 2003); Ruiz v. City of Brush, No. 05-CV-00897-EWN-CBS (D. Colo. 2006); Supreme Auto Transport v. Athena Assurance Co., No. 04-CV-02323-EWN-PAC (D. Colo. 2006); Kralicek v. City of Colorado Springs, No. 05-CV-00902-PSF-CBS (D. Colo. 2005); Lacy v. Old Standard Life Insurance, Inc., No. 04-CV-02351-EWN-MEH (D. Colo. 2006); Church Communication Network, Inc. v. Echostar Satellite L.L.C., No. 04-CV-02206-EWN-PAC (D. Colo. 2006); Ronwin v. Allstate Insurance Co., No. 03-N-1528 (D. Colo. 2005); Hepner v. U.S. Bankruptcy Court for the District of Colorado, No. 05-CV-02086-EWN (D. Colo. 2005); and Melonakis-Kurz v. Heartland Home Finance, Inc., No. 03-CV-02485-MSK-PAC (D. Colo. 2006).

[9] The Court of Appeals failed to follow the plain language of the Local Rule 7.1A for the District of Colorado. (D.C. COLO. L. CIV. R. 7.1A). The sole function of the Court was to enforce this rule according to its terms, not to change it. (Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 123 and 126 (1989); United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241-242 (1989); and In re McGowan, 226 B.R. 13, 21 (8th Cir. BAP 1998)). Since the respondents did not state or certify their efforts, to meet and confer on all issues, in their motions for sanctions, the motions should not have even been considered by the

substantial compliance test (standard). Therefore, the plain meaning of Local Rule 7.1A was and still is in effect, not substantial compliance, (Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 123 and 126 (1989); United States v. Ron Pair Enters, Inc., 489 U.S. 235, 241-242 (1989); and In re McGowan, 226 B.R. 13, 21 (8th Cir. BAP 1998)), unless and until modified, properly, by the District Court of Colorado or abrogated by the Judicial Counsel. (FED. R. CIV. P. 83 and 28 U.S.C. §§ 2071, 2073, & 2077 (West 2006)).

Therefore, the decision of the Court of Appeals violated the plain meaning of Title 28 and of the Federal Rules of Civil Procedure. Local rules may only be enacted or changed pursuant to Rule 83. For a new rule or amendment to that rule, public notice and comment are required, along with the consent of a majority of the district judges or by abrogation by the Judicial Counsel. (FED. R. CIV. P. 83 and 28 U.S.C. §§ 2071, 2073, & 2077 (West 2006); and Martel v. County of Los Angeles, 34 F.3d 731, 737 (9th Cir. 1994)).

However, neither public notice or comment nor the consent of the majority of the District Court was ever given or obtained. In the present case, without the authority (power), the Court of Appeals for the Tenth Circuit and District Court erroneously changed Local Rule 7.1A from a plain meaning analysis to a substantial compliance test. This change should have also been applied prospectively, not to the present case. (FED. R. CIV. P. 83). Again, sanctions should not be awarded when a change occurred in the middle of or at the end of a case, especially considering the change was by improper procedures.

District Court, but denied.

Additionally, since the lower Courts changed Local Rule 7.1A, from the plain language of this rule requiring (1) a movant to certify its efforts and (2) to meet and confer on all matters (D.C. COLO. L. CIV. R. 7.1A), to only a substantial compliance with this rule, attorneys, now, do not have to truly meet and confer. All an attorney has to say now is that he or she addressed one or two of the issues, sometime during the lawsuit, with the non-moving counsel. The attorney does not even have to certify his or her compliance, thus, causing confusion among attorneys and others.

Thus, under the substantial compliance standard, not only any letter filed sometime in the lawsuit, but also even a prior motion, served sometime during the lawsuit, could satisfy the substantial compliance test. The effect of this standard is that if an attorney does not meet and confer on all of the issues and does not certify his or her efforts, the attorney can evade a denial of the motion, after the fact, by just saying that he or she addressed a few of the issues in a prior letter, motion, or other document at sometime in the lawsuit and does not have to address all of the issues, not even the main issue (sanctions).

This is an absurd result, a violation of this rule and the Constitution, and not the intent or policy behind the clear and unambiguous language of Local Rule 7.1A. The intent and policy are to require moving-attorneys to meet and confer just prior to serving and filing a motion. The purpose of this conference is to try and settle what is at issue in the motion, without court intervention. If the issues could not be settled, then, to state the efforts that the moving counsel made to meet and confer or to certify his or her compliance as to all of the issues in the motion. If this does not occur, the motion must be denied.

Thus, Local Rule 7.1A is now, as changed, fundamentally unfair, thus, unconstitutional. This rule did not and does not provide the requisite notice and is arbitrary and capricious in violation of due process. (U.S. CONST. amend. V). Additionally, Local Rule 7.1A treats similarly situated attorneys differently (arbitrary discriminates) in violation of equal protection. (U.S. CONST. amend. V).

Therefore, Local Rule 7.1A is not only facially unconstitutional, now, because it is void for vagueness[10] under the new substantial compliance test, but also unconstitutional as applied to counsel. (U.S. CONST. amend. V ; Clark v. Martinez, 125 S.Ct. 716, 724 (2005); Salinas v. United States, 522 U.S. 52, 60 (1997); and Price v. Time, Inc., 416 F.3d 1327, 1342 (11th Cir. 2005)).

When the language of rules are clear and unambiguous as they were in the present case, before the change in Local Rule 7.1A, and as discussed above, the Court of Appeals for the Tenth Circuit and District Court had a duty not to even interpret this rule. However, if it did, the interpretation was required to be in a way that did not violate the Due Process and Equal Protection Clauses and Doctrines of Void for Vagueness and Constitutional Avoidance. These duties emanate from the Doctrine of Constitutional Avoidance. (U.S. CONST. amend. V; Clark v. Martinez, 125 S.Ct. 716, 724 (2005); Salinas v. United States, 522 U.S. 52, 60 (1997); and Price v. Time, Inc., 416 F.3d 1327, 1342 (11th Cir. 2005)).

More specifically, in light of fundamental fairness, the decision of the Court of Appeals violated the Due Process Clause of the United States Constitution. Procedural Due

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[10] Until, through proper procedures, the District Court changes Local Rule 7.1A.

Process requires that the petitioners and their counsel receive notice. (U.S. CONST. amend. V and Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985)). An informal Rule 11 warning letter, sent to any attorney up to 11 months before a motion for sanctions is served, does not give notice to counsel that the letter is an attempt to meet and confer, as to all issues, pursuant to Local Rule 7.1A. Since the procedures to change Local Rule 7.1A were not followed, notice was also not provided as to the changing of this rule from its plain language to a substantial compliance standard.

Furthermore, Substantive Due Process (fundamental fairness) and equal protection, also requires that a rule not be arbitrary and capricious or arbitrarily discriminating, respectively. (U.S. CONST. amend. V). For example, courts can now arbitrarily pick and chose who to sanction, if they do not merely like a case, even though the case is meritorious, depending on whether they follow the plain language of this rule or not. Under the plain meaning of Local Rule 7.1A, if one attorney does not follow the plain meaning of this rule and does not fully satisfy this rule, the motion will be denied. (D.C. COLO. L. CIV. R. 7.1A).

Whereas, if another attorney, under the substantial compliance test, also does not follow Local Rule 7.1A by certifying his or her efforts and by meeting and conferring on all of the issues, again, the attorney can evade denial of the motion, after the fact. All that the attorney has to say is he or she addressed a few of the issues in a prior letter, motion, or other document, at sometime in the lawsuit, and does not have to address all of the issues, not even the main issue.

CONCLUSION

Therefore, for the aforementioned reasons, the Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,
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In Propria Persona

(any footnotes trail end of each document)
No. 05-1129, 05-1272

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STEPHEN C. ROTH and JEAN E. GUMESON,
Plaintiffs,

v.

MICHAEL F. GREEN; DENNIS SPRUELL; MATT BUFFINGTON; BROOKS BENNETT; HUGH RICHARDS; DANNY DUFUR; JEFF COLEMAN; TIM ROWELL; TOM HALPER; MIKE MEUER; KEN BRACKETT; SAM HAGER; ROY C. LANE; JERRY MARTIN; JOEY M. CHAVEZ; AL BELL; SYDNEY DUKE SCHIRARD; DALE WOOD, individually and in their official capacities; CITY OF CORTEZ, a public corporation; CITY OF DURANGO, a public corporation; TOWN OF MOUNTAIN VILLAGE, a public corporation; DOLORES BOARD OF COUNTY COMMISSIONERS, reads as The Board of County Commissioners for the County of Dolores, a public corporation; LA PLATA COUNTY BOARD OF COUNTY COMMISSIONERS, reads as The Board of County Commissioners for the County of La Plata, a public corporation; MONTEZUMA COUNTY, BOARD OF COUNTY COMMISSIONERS, reads as The Board of County Commissioners for the County of Montezuma, a public corporation; BILL OWENS; RAYMOND SLAUGHTER, individually and in their official capacities; and unknown Doe defendants 1 through 50,
Defendants-Appellees.

and

ROBERT J. MULHERN, Attorney-Appellant.
STEPHEN C. ROTH and JEAN E. GUMESON,
Plaintiffs-Appellants,

v.

MICHAEL F. GREEN; DENNIS SPRUELL; MATT BUFFINGTON; BROOKS BENNETT; HUGH RICHARDS; DANNY DUFUR; JEFF COLEMAN; TIM ROWELL; TOM HALPER; MIKE MEUER; KEN BRACKETT; SAM HAGER; ROY C. LANE; JERRY MARTIN; JOEY M. CHAVEZ; AL BELL; SYDNEY DUKE SCHIRARD; DALE WOOD, individually and in their official capacities; CITY OF CORTEZ, a public corporation; CITY OF DURANGO, a public corporation; TOWN OF MOUNTAIN VILLAGE, a public corporation; DOLORES BOARD OF COUNTY COMMISSIONERS, reads as The Board of County Commissioners for the County of Dolores, a public corporation; LA PLATA COUNTY BOARD OF COUNTY COMMISSIONERS, reads as The Board of County Commissioners for the County of La Plata, a public corporation; MONTEZUMA COUNTY, BOARD OF COUNTY COMMISSIONERS, reads as The Board of County Commissioners for the County of Montezuma, a public corporation; BILL OWENS, individually and in his official capacity; RAYMOND SLAUGHTER, individually and in his official capacity; and unknown Doe defendants 1 through 50,
Defendants-Appellees.

October 30, 2006, Filed

COUNSEL: Robert J. Mulhern, Telluride, Colorado, for Plaintiffs-Appellants.

Katherine Taylor Eubank of Fowler, Schimberg & Flanagan, Denver, Colorado, (Daniel M. Fowler of Fowler, Schimberg & Flanagan; Jonathan A. Cross and Sean J. Lane of Cross Sands and Sares, Glendale, Colorado; Earl G. Rhodes, Jodie L. Behrmann and Jeffrey A. Wells of Younge & Hockensmith, Grand Junction, Colorado; David R. Brougham of Hall & Evans, Denver, Colorado; Danielle Moore, Assistant Attorney General, Colorado Attorney General's Office, Denver, Colorado; Gordon L. Vaughan of Vaughan & DeMuro, Colorado Springs, Colorado, with her on the brief), for the Defendants-Appellees.

Sean J. Lane of Cross Sands and Sares, Glendale, Colorado; Gordon L. Vaughan of Vaughan and DeMuro, Colorado Springs, Colorado, for Defendants-Appellees, City of Cortez, Dennis Spruell, Danny Dufur and Roy C. Lane.

JUDGES: Before BRISCOE, McCONNELL, Circuit Judges, and SILER, Circuit Judge. *

OPINION BY: BRISCOE

OPINION:

BRISCOE, Circuit Judge.

These appeals challenge a sanction award against counsel pursuant to Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927, as well as a fee award against two

individual plaintiffs pursuant to 42 U.S.C. § 1988. Both appeals arise out of the same ill-fated § 1983 action.

Plaintiffs Stephen Roth and Ellen Gumeson, represented by attorney Robert Mulhern, filed suit under 42 U.S.C. § 1983 against various Colorado municipalities, counties, and local and state employees, arguing that the stop and search of their car, as well as their ensuing arrest, was unconstitutional. The district court granted defendants' motions to dismiss and/or for summary judgment. Plaintiffs appealed. While the appeal was pending the district court granted defendants' motions for sanctions and fees against attorney Mulhern. Thereafter, this court affirmed the district court's decision on the merits, granted a motion by one group of defendants for attorneys fees on appeal, and remanded the case to the district court for a determination of the proper amount of fees.

In Appeal No. 05-1129, attorney Mulhern appeals the district court's award of sanctions and fees against him and in favor of defendants. In Appeal No. 05-1272, plaintiffs Roth and Gumeson appeal the fee determination made by the district court on remand. We exercise jurisdiction over both appeals pursuant to 28 U.S.C. § 1291. In Appeal No. 05-1129, we reverse the district court's order granting Rule 11 sanctions against Mulhern and remand to the district court for a determination of the proper amount of fees to be assessed against Mulhern pursuant to 28 U.S.C. § 1927. In Appeal No. 05-1272, we vacate the district court's fee award and remand for further proceedings to include the district court's consideration of the ability of Roth and Gunneson to pay whatever fee amount the court may assess against them.

I.

Factual history

On June 15, 2000, officers associated with the Twenty-Second Judicial Drug Task Force in Colorado set up a narcotic "ruse" checkpoint on Highway 145 just north of the town of Rico, in Dolores County, Colorado. As part of this "ruse" checkpoint, the officers placed a sign on the highway that stated a narcotics checkpoint was being conducted one mile ahead. A second sign was placed further down the highway stating that a drug dog was in use as part of the narcotics checkpoint. The statements made on the signs, however, were false. No narcotics checkpoint existed. Instead, officers were stationed in inconspicuous areas along the highway in the area of the signs watching for any illegal or suspicious activity. No stops were to be made unless officers observed or otherwise had reasonable suspicion of some type of illegal activity associated with a particular vehicle.

At approximately 4:30 p.m. on June 15, 2000, Deputy Hugh Richards of the Montezuma County Sheriff's Department was stationed between the two signs on Highway 145. Richards observed a female passenger in a blue Toyota throw an object out of the window. Based upon his observations, Richards radioed ahead and the blue Toyota was stopped for littering by task force member Dennis Spruell, a sergeant with the Cortez (Colorado) Police Department. After initially radioing Spruell, Richards retrieved the object, which turned out to be a wooden pipe with burnt residue and a screen. The pipe smelled of marijuana. Richards again radioed Spruell to advise him of what he had found. The

driver of the vehicle, Stephen Roth, was advised that he had been stopped because his passenger had been observed throwing an object out the window. Roth stated that the object was a pop can. Roth was then asked if he would consent to a search of his vehicle. Roth declined to give consent. Spruell informed Roth and the passenger, Ellen Gumeson, that he suspected that marijuana contraband had been thrown from the vehicle, and thus he had reasonable suspicion that further evidence of contraband would be found in the vehicle. During the ensuing search, Spruell and Jeff Coleman, another member of the task force from the Durango (Colorado) Police Department, found a wooden marijuana pipe with burnt residue under the front driver's seat. Inside a cooler located in the back seat, officers found plastic baggies containing psilocybin mushrooms, a Schedule I controlled substance. Both Roth and Gumeson were arrested.

During the ensuing criminal proceedings in Dolores County, Roth unsuccessfully moved to suppress the evidence seized during the search of the vehicle. Gumeson subsequently pled guilty to littering. On December 11, 2001, Roth was found guilty at trial of possession of drug paraphernalia and fined $ 100.00. Roth appealed his conviction to the Colorado Court of Appeals (CCA), arguing that the evidence seized from his vehicle should have been suppressed because it was the fruit of an unconstitutional checkpoint employed by law enforcement officers, and because Deputy Richards could not reasonably have observed Gumeson throw anything out of the vehicle window and/or likely searched the incorrect area after observing Gumeson's actions. The CCA affirmed Roth's conviction on August 14, 2003. *People v. Roth*, 85 P.3d 571 (Colo. App. 2003).

In doing so, the CCA held that the use of the fictitious drug checkpoint did not violate Roth's rights under the Fourth Amendment because the stop of his car was based on the officers' individualized suspicion of unlawful activity, and the officers had probable cause to believe the car contained evidence of a crime and thus were justified in searching the car and its contents. Although Roth filed petitions for writs of certiorari with the Colorado Supreme Court and the United States Supreme Court, those petitions were denied. *Roth v. People*, 2004 Colo. LEXIS 127, No. 03SC641, 2004 WL 423074 (Colo. Mar. 8, 2004), cert. denied, 543 U.S. 932, 125 S. Ct. 325, 160 L. Ed. 2d 235 (2004).

The original district court proceedings

On June 12, 2002, while Roth's state criminal appeal was still pending, Roth and Gumeson initiated this 42 U.S.C. § 1983 action by filing a complaint in federal district court against seventy-six defendants, including various state and county officials (e.g., the governor of the State of Colorado and the heads of at least three municipal police departments whose employees participated in the narcotics task force), several Colorado municipalities, and approximately fifty "unknown Doe defendants." In their complaint, Roth and Gumeson alleged that the defendants "created, established, and executed an unconstitutional drug checkpoint on . . . June 15, 2000," that ultimately resulted in Roth and Gumeson being unlawfully stopped, detained, searched and arrested. ROA, Vol. 1, Doc. 1 at 8. The complaint, which alleged four separate causes of action under § 1983 arising out of the general allegations, sought general, special and punitive damages, attorneys' fees and costs, and declaratory

relief.

Defendants moved to dismiss the complaint and/or for summary judgment. Rather than responding directly to those motions, Roth and Gumeson asked the district court to stay the case "until the appellate process, including any writs," in Roth's state criminal case was "completed." ROA, Vol. 1, Doc. 46 at 1. The district court denied the motion to stay and ordered Roth and Gumeson to respond to the defendants' pending motions. Id., Doc. 51. After responding to defendants' motions, Roth and Gumeson filed a motion asking the district court to stay all pretrial proceedings. Id., Vol. 2, Doc. 72. That motion was granted by the magistrate judge on February 5, 2003.

On December 5, 2003, after allowing the parties to complete their briefing on the pending motions to dismiss and/or for summary judgment, the district court granted the motions and dismissed the action in its entirety. In doing so, the district court concluded: (1) it was precluded by the Rooker-Feldman doctrine n1 from considering Roth's claims because the identical issues were decided against Roth in his state criminal proceedings; (2) Roth was precluded under the doctrine of collateral estoppel from challenging the constitutionality of the ruse checkpoint and his stop, detention and arrest; (3) both Roth and Gumeson were precluded, pursuant to the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), from pursuing their § 1983 claims until such time, if ever, that they had successfully challenged their Colorado state convictions arising from the stop, search and arrest; (4) the claim of civil conspiracy asserted by Roth and Gumeson under § 1983

failed as a matter of law because they did not allege any "specific facts showing any agreement or collaboration between [the] Defendants to undertake an improper, illegal, or unconstitutional activity," ROA, Vol. 3, Doc. 121 at 13; and (5) in addition to these various bases for dismissal, defendants were entitled to summary judgment because the undisputed facts established that the "ruse checkpoint" was constitutional in light of the decision in *United States v. Flynn*, 309 F.3d 736 (10th Cir. 2002), which the district court concluded involved "virtually identical facts and [wa]s dispositive," ROA, Vol. 3, Doc. 121 at 16. Judgment was entered in the case on December 11, 2003.

Roth and Gumeson filed a notice of appeal on January 5, 2004. On that same date, Roth and Gumeson filed a motion asking the district court for permission to proceed on appeal in forma pauperis. The district court denied that motion on February 2, 2004, concluding "th[e] appeal [wa]s not taken in good faith because plaintiffs ha[d] not shown the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." Id., Doc. 148 at 2.

The motions for sanctions and/or fees and costs

In late December 2003 (after the district court entered judgment but before Roth and Gumeson filed their notice of appeal) and in early January 2004, defendants filed motions for sanctions against Robert Mulhern, the attorney for Roth and Gumeson, and/or for attorney fees and costs pursuant to 28 U.S.C. § 1927. Mulhern filed a lengthy response to those motions on January 14, 2004. According to Mulhern, he filed the complaint on June 12, 2002, out of concern "that the Statute of

Limitations was about to expire on June 15, 2002 . . . ." Id., Doc. 138 at 1. Mulhern argued that the case was meritorious because: (1) the "case should have been stayed, not dismissed," until the conclusion of Roth's state criminal proceedings, id. at 4; (2) the holding in Heck was not applicable "to this search and seizure case," id.; (3) he was not allowed to engage in discovery; (4) "all [defendants] were at least personally involved," id.; (5) the case "should have been analyzed using checkpoint law, not individualized suspicion," id.; and (6) "[t]he Flynn case [wa]s in conflict with decisions from not only the Supreme Court of the United States, but also a decision from the United States Court of Appeals for the Tenth Circuit, among other courts." Id. In addition, Mulhern argued that the defendants failed to meet and confer with him prior to filing their motions, as required by the district court's local rules, and also failed to comply with the procedures outlined in Rule 11 by providing him with copies of their motions at least twenty-one days prior to filing those motions.

On February 13, 2004, Roth and Gumeson filed a motion for sanctions pursuant to Rule 11 and/or attorney fees and costs pursuant to 28 U.S.C. § 1927 against the defendants' attorneys. The only ground offered in support of the motion was that "the defendants' attorneys did not meet and confer with the plaintiffs, through their attorney of record, prior to filing the[ir] motions [for sanctions and/or fees and costs] and did not follow the required procedure for Rule 11 sanctions." Id., Doc. 156 at 2.

On June 15, 2004, the district court granted the defendants' motion for sanctions and/or fees and costs, and denied the plaintiffs' similar motion. Id., Doc. 171.

In its order, the district court concluded that Rule 11 sanctions were appropriate because (1) the defendants' respective letters to Mulhern satisfied Rule 11's "safe harbor" requirement, (2) Mulhern's pursuit of the lawsuit, despite numerous Rule 11 "safe harbor" warnings from defendants, "created unnecessary delay and needlessly increased the cost of this litigation," id. at 5, (3) the plaintiffs' claims and legal contentions "were not warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law," id. (internal quotation marks omitted), and (4) "the allegations and other factual contentions contained in Plaintiffs' claims lacked evidentiary support and would not have gained evidentiary support after further investigation or discovery." Id. Although the district court stated it "ha[d] no information on Mulhern's ability to pay sanctions," or on his "history, experience, or ability," it "consider[ed] his offense severe in terms of wasted time and wasted money," and that "despite many opportunities to change his conduct-including a failed appeal in the Colorado Court of Appeals, and the Rule 11 safe-harbor letters here-Mulhern failed to do so." Id. at 5-6. In short, the district court concluded that Mulhern "acted in bad faith," and thus "Rule 11 sanctions [we]re appropriate." Id. at 6.

The district court also concluded that "charging fees and costs personally to . . . Mulhern was appropriate" under 28 U.S.C. § 1927. Id. "In suing twenty-six named Defendants and Does 1-50," the district court concluded, "Mulhern engaged in shotgun litigation, and ignored the realities of the Defendants' non-involvement in the circumstances applicable to his clients." Id. In other words, the district court concluded, "Mulhern

unreasonably and vexatiously multiplied the Defendants in this case, thereby recklessly increasing the amount of attorney and paralegal time spent on litigation, and the costs associated therewith." Id. The district court also noted that "[d]efendants who clearly had no liability under the circumstances were forced to obtain counsel and defend against specious claims," and that "Mulhern refused to withdraw claims or dismiss various Defendants against whom claims could not be maintained." Id.

In light of this vexatious conduct, "coupled with the need for Rule 11 sanctions," the district court "conclude[d] that Mulhern should be personally liable for the fees and costs associated with [the] . . . Defendants' defense under § 1927." Id. Together, these fees and costs totaled $ 92,044.77.

As for the plaintiffs' cross-motion for sanctions and/or fees and costs, the district court characterized it as "audacious," id. at 8, and concluded that by filing it "Plaintiffs ha[d] further increased the litigation costs of their fully unsubstantiated lawsuit." Id. at 9. The district court also rejected the plaintiffs' arguments that defendants had failed to meet and confer as required by the local rules, or to provide plaintiffs with "safe-harbor" warnings under Rule 11. Id.

This court's award of fees and costs to defendants

On February 3, 2005, this court issued an order and judgment affirming the district court's order dismissing the action on its merits, affirming the district court's order denying plaintiffs' motion for sanctions, and dismissing for lack of jurisdiction Mulhern's own appeal

of the district court's order granting defendants' motions for sanctions and/or fees and costs against him. n2 Roth v. Green, 123 Fed. Appx. 871 (10th Cir. 2005).

On February 17, 2005, one group of defendants (Dennis Spruell, Danny Dufur, Roy Lane, and the City of Cortez, Colorado) filed a motion for an award of attorney fees and costs pursuant to Fed. R. App. P. 38 and 28 U.S.C. § 1912. In their motion, these defendants asked that the fees and costs be assessed against plaintiffs' attorney, Mulhern. Mulhern filed a response to the motion on behalf of himself, as well as on behalf of Roth and Gumeson. In his response, Mulhern argued that he had a reasonable basis for pursuing the appeal, sanctioning him would effectively result in the loss of his ability to practice law, and that "Roth and . . . Gumeson . . . ha[d] no money and c[ould] not pay costs." Add. 10 to Aplt. Br., Resp. at 10. On March 28, 2005, this court granted the defendants' motion in part. Joint App. at 59. Rather than relying on Fed. R. App. P. 38 or § 1912, however, this court awarded costs "in the amount of $ 363.20 pursuant to Fed. R. App. P. 39," and, "[p]ursuant to 42 U.S.C. § 1988," "award[ed] the defendants attorney's fees on appeal, in an amount to be determined by the district court on remand." Id.

On remand, the defendants who prevailed on their motion for fees and costs filed a pleading and supporting documentation asking the district court to award them fees in the amount of $ 12,049.00. Roth and Gumeson responded, arguing in pertinent part that the requested fees were unreasonable and, as they had in their response filed with this court, that they were "paupers" who could not afford to pay any amount of fees. Id. at 148. On May 12, 2005, the district court

issued an order granting defendants' motion and directing Roth and Gumeson to pay fees in the requested amount ($ 12,049.00).

II.

Appeal No. 05-1129

In Appeal No. 05-1129, Mulhern challenges, on various grounds, the district court's decision to award sanctions against him and in favor of all the defendants pursuant to Rule 11 and 28 U.S.C. § 1927. We review for abuse of discretion the district court's decision to impose Rule 11 sanctions against Mulhern. Dodd Ins. Servs., Inc. v. Royal Ins. Co. of Am., 935 F.2d 1152, 1155 (10th Cir. 1991). Likewise, we review a district court's award of § 1927 sanctions for an abuse of discretion. Resolution Trust Corp. v. Dabney, 73 F.3d 262, 265 (10th Cir. 1995). Notably, this abuse of discretion standard does "not preclude [our] correction of a district court's legal errors . . . ." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 402, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990). In other words, a district court will be deemed to have abused its discretion if its decision to impose sanctions under either Rule 11 or § 1927 "rest[ed] on an erroneous view of the law . . . ." Id. (internal quotation marks omitted).

a) Did the "law of the case" preclude the district court from issuing sanctions?

In his first issue on appeal, Mulhern contends that this court, in deciding the first set of appeals, concluded he should not be sanctioned, thereby establishing the "law

of the case" and precluding the district court from deciding the issue again.

The law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988) (internal quotation marks omitted). Thus, "when a case is appealed and remanded, the decision of the appellate court establishes the law of the case and ordinarily will be followed by both the trial court on remand and the appellate court in any subsequent appeal." *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1183 (10th Cir. 1995).

Applying those principles to the case at hand, the question is whether this court previously decided, as a matter of law, that Mulhern was not subject to sanctions under either Rule 11 or § 1927. After this court resolved the three prior appeals (by affirming the district court's rulings in two of those appeals and dismissing the third appeal for lack of jurisdiction), one group of defendants (Dennis Spruell, Danny Dufur, Roy Lane, and the City of Cortez, Colorado) filed a motion asking this court to assess attorney fees and costs against Mulhern pursuant to Fed. R. App. P. 38 and 28 U.S.C. § 1912. This court ultimately granted the motion in part, but instead of assessing fees and costs against Mulhern pursuant to Fed. R. App. P. 38 or § 1912, assessed fees against Roth and Gumeson pursuant to § 1988.

There are several reasons why this court's prior order did not decide the issue of Mulhern's liability for

sanctions under Rule 11 or § 1927. To begin with, neither the defendants' motion nor this court's order mentioned or otherwise cited either Rule 11 or § 1927, the two authorities relied upon by the district court in sanctioning Mulhern. And for good reason. Rule 11, which "focuses only on a challenged pleading or written motion," *Steinert v. Winn Group, Inc.*, 440 F.3d 1214, 1223 (10th Cir. 2006), "is generally employed in the district court, whereas Rule 38 [the rule cited in defendants' appellate motion] is used to sanction groundless appeals." *In re 60 East 80th Street Equities, Inc.*, 218 F.3d 109, 118 n.4 (2d Cir. 2000). Although § 1927 is "available to an appellate court," most appellate sanctions are imposed under Rule 38. Id. Second, and relatedly, this court's rejection of sanctions under Rule 38 or costs under § 1912 could have no bearing on the issue of the propriety of the district court's sanctions, both because the statutes differ in their focus, and because at issue before this court in the prior appeals was Mulhern's conduct in pursuing those appeals, whereas the question at issue before the district court in imposing sanctions was Mulhern's conduct in filing and pursuing the § 1983 claims in the district court. Third, the issue of sanctions under Fed. R. App. P. 38 is a matter of discretion. The fact that this court chose not to exercise that discretion and impose sanctions against Mulhern has no relevance to, and thus no impact on, the district court's decision to impose sanctions under Rule 11 and § 1927. E.g., *Wasko v. Moore*, 172 Fed. Appx. 791, 792 (10th Cir. 2006) (affirming district court's award of Rule 11 sanctions, but denying appellee's motion for sanctions pursuant to Fed. R. App. P. 38). Fourth, and finally, this court's ruling on the motion for sanctions occurred after the district court granted the defendants' motions for sanctions, and thus could not

have established the "law of the case" for purposes of the motion that was before the district court.

In sum, we conclude that this court's prior ruling on the motion for sanctions had no bearing on the district court's order sanctioning Mulhern under Rule 11.

b) Did the § 1983 *claims have merit?*

Mulhern next contends that sanctions should not have been imposed against him because the § 1983 claims asserted in the complaint had merit. More specifically, Mulhern argues that (a) "the legal contentions [we]re warranted by existing law and by non-frivolous arguments for the reversal of existing law," including "the Flynn case," (b) "the allegations and other factual contentions ha[d] evidentiary support," and (c) "the claims [we]re not being presented to harass, cause unnecessary delay, or for the needless increase in the costs of the litigation in this case." Aplt. Br. at 23. In addition, Mulhern argues, the district court should have granted his request to stay the case pending the outcome of Roth's state criminal proceedings and, had the district court done so, "very little time, effort, and/or money would have been expended by the Court and/or [the defense] attorneys in this case." Id. at 27.

The district court noted, and we agree, that there were a host of legal impediments to Roth and Gumeson prevailing on their claims. To begin with, the majority of the defendants named in the complaint had, at best, only tangential relationships to the "ruse" checkpoint, and thus were not properly named as defendants in the complaint. For example, defendant Bill Owens, the Governor of the State of Colorado, was not alleged to

have had any direct connection with, or participation in, the "ruse" checkpoint.

Even with respect to the named defendants who directly participated in the "ruse" checkpoint, it is clear that their conduct was entirely legal. Although Mulhern continues to maintain that the claims asserted in the complaint were not controlled by our decision in Flynn, he is mistaken. In Flynn, the defendant (Mack Flynn), while driving on I-40 in Muskogee County, Oklahoma, encountered two road signs nearly identical to those encountered by plaintiffs Roth and Gumeson in this case (the first said "Drug Checkpoint 1/3 mile ahead" and the second said "Drug Dogs in Use"). The defendant, upon seeing the signs, "made an abrupt lane change and immediately took the [nearest] exit ramp" off of I-40. 309 F.3d at 737. At the top of the exit ramp, the defendant briefly stopped his car while his passenger "opened the door and dropped a large sack from the car." Id. Officers who were surveilling the highway examined the sack and determined it contained narcotics (it was later verified to be methamphetamine). The defendant was then stopped, placed under arrest, and charged with various federal offenses in connection with the incident. After the district court denied his motion to suppress, the defendant entered a conditional guilty plea to four drug-related offenses. On appeal, the defendant argued, in pertinent part, that his arrest was the result of "law enforcement's illegal conduct in operating a narcotics checkpoint." *Id.* at 738 (internal quotation marks omitted). We rejected that argument, concluding that "[t]he posting of signs to create a ruse does not constitute illegal police activity," and that the defendant "never reached a drug checkpoint." Id.; see also *id.* at

739 ("The creation of a ruse to cause the defendant to abandon an item is not illegal.").

If there were any doubts about the legality of the ruse utilized by defendants in this case (and it appears that, even prior to Flynn, the legality of such a ruse was clear), those doubts should have ceased when we issued Flynn. Mulhern, in turn, upon receiving notice of the Flynn decision (and the record indicates he was repeatedly advised of the decision by the defendants in their respective letters to him), should have voluntarily dismissed the complaint. Stated differently, it was unreasonable, and a violation of his obligations as a licensed attorney, to continue to pursue the claims after the issuance of Flynn. Although Mulhern now argues that a reasonable basis exists for overruling the Flynn decision, he fails to offer any such basis.

Mulhern's assertion that he "had" to file the complaint to avoid the running of the statute of limitations, and that, in turn, the district court had an obligation to stay the case pending the outcome of Roth's state criminal proceedings, is simply wrong. "A plaintiff may not bring a civil rights suit if a favorable result in the suit would necessarily demonstrate the invalidity of an outstanding criminal judgment against the plaintiff." *Smith v. Gonzales*, 222 F.3d 1220, 1222 (10th Cir. 2000) (citing *Heck*, 512 U.S. at 487). As correctly noted by the district court, that was precisely the situation here: by asserting that they were the victims of an unconstitutional drug checkpoint, Roth and Gumeson were effectively questioning the validity of their arrests and convictions. Thus, to recover damages based on their allegations, Roth and Gumeson were first obligated to "'prove that the[ir] conviction[s] . . .

ha[d] been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.'" Id. (quoting *Heck*, 512 U.S. at 486-87). Not until they successfully did so would their § 1983 claims have arisen. Id. In other words, "'[b]ecause the[ir] cause[s] of action d[id] not accrue until such time, the applicable statute of limitations d[id] not begin to run until the same time.'" Id. (quoting *Heck*, 512 U.S. at 489-90). Thus, Mulhern was in no way obligated to file suit against defendants, and indeed clearly should have waited until such time, if ever, as the Colorado state courts granted relief to Roth and Gumeson from their convictions.

In sum, the district court did not abuse its discretion in concluding that Mulhern violated the provisions of both Rule 11 and § 1927 in filing and pursuing the § 1983 claims on behalf of Roth and Gumeson.

c) Did the defendants fail to meet and confer with Mulhern?

Mulhern contends that sanctions were improperly imposed against him because the defendants failed to first "meet and confer" with him prior to filing their motions for sanctions, as required by Rule 7.1 of the district court's local rules. We review a district court's application of its local rules for abuse of discretion. *Hernandez v. George*, 793 F.2d 264, 268 (10th Cir. 1986).

District of Colorado Local Rule 7.1 provides, in pertinent part, as follows:

A. Duty to Confer. The court will not consider any motion, other than a motion under Fed. R. Civ. P. 12 or 56, unless counsel for the moving party or a pro se party, before filing the motion, has conferred or made reasonable, good-faith efforts to confer with opposing counsel or a pro se party to resolve the disputed matter. The moving party shall state in the motion, or in a certificate attached to the motion, the specific efforts to comply with this rule.

D.C. Colo. L. Civ. R. 7.1.

In its order granting defendants' motions for sanctions, the district court rejected Mulhern's assertion that defendants failed to comply with Local Rule 7.1. Specifically, the district court noted that each set of defendants sent Mulhern a "warning or 'safe-harbor'" letter outlining the deficiencies of each claim asserted in the complaint, asking that Mulhern voluntarily dismiss the complaint, and warning that Mulhern's failure to do so would result in the filing of motions for sanctions and fees. ROA, Vol. 3, Doc.171 at 9. In the district court's view, these letters "substantially satisf[ied] . . . the local rule." Id.

Mulhern offers four reasons why the defendants' letters should not be deemed sufficient to satisfy Rule 7.1's "meet and confer" requirement. First, he argues that if defense counsel "did meet and confer [with him], they would have stated and were required to state in their sanctions motions and/or certify their specific efforts." Aplt. Br. at 10. Second, he argues that the letters "did not say anything about Rule 7.1 A or that the letters were meet and confer letters." Id. Third, he argues that the letters failed to address each of the grounds

ultimately asserted by defendants in their respective motions to dismiss and/or for summary judgment. Fourth, he argues that the defendants' letters were sent to him "up to eleven (11) months prior to [defendants'] filing the motions for sanctions," and thus did not meet the spirit of Rule 7.1. Id. at 12.

We reject Mulhern's arguments and conclude that the district court did not abuse its discretion in applying Rule 7.1. As noted, each letter advised Mulhern that, in the defendants' view, the claims asserted in the complaint were, for various reasons, meritless and should therefore be voluntarily dismissed. Further, each letter provided Mulhern with notice that, should he fail to voluntarily dismiss the complaint, defendants would move for sanctions against him. In short, each letter effectively complied with Local Rule 7.1 by attempting to seek a resolution of the issue (i.e., the frivolousness of the plaintiffs' claims) without first seeking resort to the district court's intervention. Although Mulhern complains that defendants failed to outline, in their motions, their efforts to meet and confer, he acknowledges that defendants attached to their motions copies of the letters they sent to him. In our view, the district court did not abuse its discretion in concluding that this "substantially satisfied" the requirements of Rule 7.1. Lastly, Rule 7.1 is silent with regard to precisely when the parties must meet and confer prior to the filing of a related motion. Thus, it was not a violation of Rule 7.1 for defendants to wait several months after sending their letters to Mulhern before filing their motions for sanctions (indeed, it arguably favored Mulhern by providing him with a considerable period of time in which to voluntarily dismiss the complaint).

d) Did defendants follow the procedures outlined in Rule 11*?*

Finally, Mulhern contends the district court should not have granted the defendants' motions for Rule 11 sanctions because defendants "did not serve [him] with their Rule 11 motions prior to filing the motions," and thus violated the so-called "safe harbor" provision of Rule 11. Aplt. Br. at 17. Mulhern also contends that "Rule 11 required that the motions for sanctions were to be served and filed before the conclusion of the civil rights case." Id. at 18.

Federal Rule of Civil Procedure 11 provides, in pertinent part, as follows:

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. * * *

Fed. R. Civ. P. 11(c).

The first question raised by Mulhern is whether defendants complied with the "safe harbor" provisions outlined in Rule 11(c)(1)(A). As noted, that subsection states that motions for sanctions "shall be served . . . but not filed with or presented to the court unless, within 21 days after service of the motion" the challenged pleadings or claims have not been "withdrawn or appropriately corrected." Although defendants all sent Mulhern warning letters well in advance of filing their motions for sanctions, it is uncontroverted that they did not, as required by subsection (c)(1)(A), serve him with copies of their actual motions for sanctions twenty-one days prior to filing those motions. Indeed, it appears from the record on appeal that the motions were served on Mulhern at the same time as, or after, the motions were actually filed.

As they did in the district court, however, defendants contend that the warning letters they sent to Mulhern months in advance of filing their motions for sanctions effectively satisfied the requirements of subsection (c)(1)(A) by providing Mulhern with notice of their intent to seek sanctions and an opportunity to withdraw the complaint prior to them filing their motions. Although the district court agreed with defendants, we conclude, for the reasons discussed below, that defendants' letters were not sufficient to

satisfy the requirements of subsection (c)(1)(A), and thus the district court abused its discretion in granting defendants' motions for Rule 11 sanctions.

Contrary to defendants' arguments, nothing in subsection (c)(1)(A) suggests that a letter addressed to the alleged offending party will suffice to satisfy the safe harbor requirements. Rather, the plain language of subsection (c)(1)(A) requires a copy of the actual motion for sanctions to be served on the person(s) accused of sanctionable behavior at least twenty-one days prior to the filing of that motion. This conclusion is bolstered by the Advisory Committee's Notes to the 1993 amendment to Rule 11 (which added the safe harbor provision):

The rule provides that requests for sanctions must be made as a separate motion, i.e., not simply included as an additional prayer for relief in another motion. The motion for sanctions is not, however, to be filed until at least 21 days (or such other period as the court may set) after being served. These provisions are intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation. * * *

To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the "safe harbor" period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give

informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

Fed. R. Civ. P. 11, advisory committee notes, 1993 Amendments (emphasis added). In other words, the Advisory Committee's Notes clearly suggest that warning letters, such as those sent by defendants to Mulhern, are supplemental to, and cannot be deemed an adequate substitute for, the service of the motion itself.

The reason for requiring a copy of the motion itself, rather than simply a warning letter, to be served on the allegedly offending party is clear. The safe harbor provisions were intended to "protect[] litigants from sanctions whenever possible in order to mitigate Rule 11's chilling effects, formaliz[e] procedural due process considerations such as notice for the protection of the party accused of sanctionable behavior, and encourag[e] the withdrawal of papers that violate the rule without involving the district court . . . ." 5A Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1337.2, at 722 (3d ed. 2004). Thus, "a failure to comply with them [should] result in the rejection of the motion for sanctions . . . ." Id. at 723.

To be sure, the Seventh Circuit has, as noted by defendants, held that a letter sent to an offending party, rather than a copy of the actual motion, can constitute substantial compliance with Rule 11(c)(1)(A). See Nisenbaum v. Milwaukee County, 333 F.3d 804, 808 (7th Cir. 2003). We find this decision unpersuasive, however, because it contains no analysis of the language of Rule 11(c)(1)(A) or the Advisory

Committee Notes, cites to no authority for its holding, and indeed is the only published circuit decision reaching such a conclusion. See Wright and Miller, supra, § 1337.2, at 726 (citing cases).

Mulhern also contends that the motions for sanctions should have been denied because they were not filed until after the district court had dismissed the complaint. We agree. "The addition of the safe harbor provision in the 1993 amendment [to Rule 11] dramatically changed the effect that a final judgment or the dismissal of the claim has on the possibility of a Rule 11 proceeding." Wright and Miller, supra, § 1337.2, at 727. "[S]ervice of a sanctions motion after the district court has dismissed the claim or entered judgment prevents giving effect to the safe harbor provision or the policies and procedural protections it provides, and it will be rejected." Id.; see Brickwood Contractors, Inc. v. Datanet Eng'g, Inc., 369 F.3d 385, 389 (4th Cir. 2004) ("Because the rule requires that the party submitting the challenged pleading be given an opportunity to withdraw the pleading, sanctions cannot be sought after summary judgment has been granted."); *Tompkins v. Cyr*, 202 F.3d 770, 788 (5th Cir. 2000) (affirming denial of motion for Rule 11 sanctions made after completion of trial); *Barber v. Miller*, 146 F.3d 707, 710 (9th Cir. 1998) (holding that a party cannot wait until after summary judgment to move for sanctions, even if that party informally warned the offending party about the potential of Rule 11 sanctions); *Ridder v. City of Springfield*, 109 F.3d 288, 297 (6th Cir. 1997) (holding that "a party cannot wait until after summary judgment to move for sanctions under Rule 11"); see also *Aerotech, Inc. v. Estes*, 110 F.3d 1523, 1528-29 (10th Cir. 1997) (concluding that Rule 11 sanctions were

unavailable to defendant who moved for sanctions after plaintiff moved to voluntarily dismiss its claims against defendant).

For these reasons, we conclude the district court abused its discretion in granting defendants' motions for sanctions under Rule 11. Because, however, the district court also awarded defendants fees under § 1927, we conclude the proper course is to reverse and remand to the district court to determine the proper amount of fees and costs to be assessed under § 1927 (i.e., "the excess costs . . . and attorneys' fees reasonably incurred because of" his unreasonable and vexatious conduct).

Appeal No. 05-1272

In Appeal No. 05-1272, Roth and Gumeson challenge the district court's May 12, 2005 order directing them to pay attorney fees in the amount of $ 12,049.00. "We review both the court's decision to award attorney's fees and the reasonableness of the amount awarded for an abuse of discretion." *Houston v. Norton*, 215 F.3d 1172, 1174 (10th Cir. 2000).

a) Inability to pay

In the first of their two arguments on appeal, Roth and Gumeson contend that the district court, in determining the reasonableness of the fee award, abused its discretion by failing to take into account their inability to pay. In support of this argument, Roth and Gumeson state that they are paupers who simply cannot afford to pay any award. Roth and Gumeson assert that the district court's fee award will effectively penalize them

by forcing them "into financial ruin and bankruptcy . . . ." Aplt. Br. at 5. Thus, they argue, the district court's fee award violates their due process rights.

In deciding this issue, it is necessary to begin with the statute under which the fee award was issued. As noted, the fee award originated at the conclusion of the prior set of appeals, when a group of defendants moved for costs and fees and we granted their motion in part and awarded them fees pursuant to 42 U.S.C. § 1988. Section 1988 provides, in pertinent part, that "[i]n any action or proceeding to enforce a provision of . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ." 42 U.S.C. § 1988(b). Construing this statute, the Supreme Court has held that the prevailing party in a civil rights case "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterp.*, 390 U.S. 400, 402, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968). Although we have not addressed the issue, "[a]ll the courts of appeals which have addressed the issue have concluded that a nonprevailing plaintiff's ability to pay is not a proper factor to consider in determining *whether* to award attorneys' fees against [the plaintiff], but may be considered when determining *the amount* of the attorneys' fees to be awarded against that party." n3 *Wolfe v. Perry*, 412 F.3d 707, 723-24 (6th Cir. 2005) (italics in original; internal quotation marks omitted); see id. (citing cases); *Alizadeh v. Safeway Stores, Inc.*, 910 F.2d 234, 238-39 (5th Cir. 1990) (holding that a party's financial condition is not a proper factor to consider in determining whether to award fees against that party, but is a factor that should be considered in fixing the amount of such an award);

Miller v. Los Angeles County Bd. of Educ., 827 F.2d 617, 621 (9th Cir. 1987) (holding that the amount of an award should not subject the non-prevailing "plaintiff to financial ruin"). We adopt and proceed to apply that same rule here.

Roth and Gumeson argued to the district court, prior to its determining the amount of the fee award, that they were paupers who could not afford to pay any amount of fees. Joint App. at 148 (detailing each plaintiff's monthly income and expenses). The district court, in its order establishing the amount of the fee award, rejected this argument on the grounds that the plaintiffs' ability to pay "may be a factor when determining whether to award fees -- which has already been decided by the Tenth Circuit -- not when assessing the proper amount of the award, which is my charge here on remand." Id. at 171. In light of the above-cited authority, however, just the opposite is true, i.e., the plaintiffs' ability to pay was not a relevant factor in determining *whether* to award fees against them, but was a relevant factor for the district court to consider in determining *the amount* of the fee award. Thus, the district court abused its discretion in failing to take into account the plaintiffs' ability to pay, and the fee award must be vacated and the case remanded for further proceedings on the fee issue.

b) Reasonableness of amount of fee award

In their second argument, Roth and Gumeson argue that the amount of fees assessed by the district court was unreasonable (and thus an abuse of discretion) because it represented the fees incurred by the defendants' attorneys in responding to all three of the

prior appeals (i.e., the appeal of the dismissal of the complaint on the merits, the appeal of the sanction award against Mulhern, and the appeal of the denial of plaintiffs' cross-motion for sanctions), rather than just the fees incurred in responding to the appeal by Roth and Gumeson of the district court's dismissal of their § 1983 claims.

Roth and Gumeson asserted this same argument below.

The district court rejected it, stating:

The three appeals in this matter were consolidated for oral argument in front of the Tenth Circuit. Defendants' counsel did not separate out the time attributable to the other appeals -- which related solely to my award of sanctions, fees, and costs -- when preparing for oral argument. I agree with Defendants that it is reasonable to include all of the time spent preparing for the argument to the appellate court, despite the fact that the argument included other related appeals.

Joint App. at 171.

Roth and Gumeson fail to offer any rational arguments, let alone any authority, establishing that the district court abused its discretion in including in the fee award amounts related to work spent by defense counsel on all three appeals. As the relevant facts establish, all three of the prior appeals arose out of plaintiffs' filing, and ultimately the dismissal, of their § 1983 claims. This includes the two appeals that pertained to the sanctions issues, since those issues directly pertained to whether or not Mulhern had a reasonable basis for filing the claims in the first place, and for continuing to maintain

those claims after receiving the various warning letters from defense counsel. Moreover, the defendants were the "prevailing party" with respect to all of those related issues, and thus appear to have been entitled to the full amount of the fees incurred pursuant to § 1988(b). Thus, the district court did not abuse its discretion in taking into account all of the fees incurred by defendants in responding to the three related appeals. Cf. *Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (holding that fees cannot be awarded under § 1988 for "unrelated claims").

In Appeal No. 05-1129, we REVERSE the district court's order granting Rule 11 sanctions against Mulhern and in favor of defendants, and REMAND to the district court for a determination of the proper amount of fees to be assessed against Mulhern pursuant to 28 U.S.C. § 1927. In Appeal No. 05-1272, we VACATE the district court's fee award and REMAND for further proceedings to include the district court's consideration of the ability of Roth and Gumeson to pay whatever fee amount the court may assess against them.

Footnotes

* The Honorable Eugene E. Siler, Jr., Circuit Court Judge, Sixth Circuit, sitting by designation.

n1 The Rooker-Feldman doctrine, based on two United States Supreme Court cases, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S. Ct. 149, 68 L. Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983), "prevents the lower federal courts from

exercising jurisdiction over cases brought by state-court losers challenging state-court judgments rendered before the district court proceedings commenced." *Lance v. Dennis*, 546 U.S. 459, 126 S. Ct. 1198, 1199, 163 L. Ed. 2d 1059 (2006) (internal quotation marks omitted).

n2 This court concluded it lacked jurisdiction over the district court's order granting defendants' motions for sanctions and/or fees and costs against Mulhern because, at the time of its decision, the district court had not entered an order determining the amount to be awarded to one group of defendants (the district court ultimately issued an order in that regard on February 15, 2005).

n3 In response, defendants "concede that the Tenth Circuit has held that a district court should consider the plaintiff's ability to pay in determining the amount of fees." Aplee. Br. at 3. In support of this concession, defendants cite to *White v. Gen. Motors Corp.*, 908 F.2d 675 (10th Cir. 1990). White, however, did not deal with an award of fees under § 1988, but rather with the appropriate amount of sanctions under Rule 11. Thus, White is not controlling.

(D.C. No. 02-CV-1116-LTB-CBS.)

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

STEPHEN C. ROTH and JEAN E. GUMESON,
Plaintiffs,

v.

MICHAEL F. GREEN et al

ORDER

This matter is before me on Defendants Town of Mountain Village, Ken Brackett and Dale Wood's motion for Supplement Order Regarding Attorney Fees filed on August 5, 2004. I GRANT this motion.

On December 3, 2005, I wholy dismissed Plaintiff Stephen C. Roth and Jean E. Gumeson's 42 U.S.C. Sec 1983 case after determining that they had completely failed in their suit against the seventy-six individual and organization defendants. Subsequently, On June 14, 2004, I granted Defendants' Motion for Fed. Civ. P. 11 sanctions and attorney fees and costs. Specifically, In condluded the Fed. R. Civ. P. 11 sanctions asginst Plaintiffs were warranted, and that their attorney Roberts Mulhern was personally liable for attorney fees and costs associated with vexaciously multiplying the proceedings under 28 U.S.C. Sec. 1927. However, because Defendants had not submitted an affidavit detailing their attorney fees and costs to defend Plaintiffs' unsupported claims, I held in abeyance my specific conclusion as to the amount Mulhern owed

Defendants until such affidavit was submitted.

Defendants' subsequently filed an Affidavit of Counsel re: Attorney Fees and Costs, on June 28, 2004, in which they asserted that the attorney fees incurred totaled $14, 211.50, and costs amounted to $577.86, for a ttoal of $14789.36. Upon my review of the affidavit, and finding the amount fair and reasonable in light of the circumstances of this case, I hold that Mulhern is personally responsible for this amount.

Accordingly, I GRANT Defendants Town of Mountain Village, Ken Brackett and Dale Wood's Motion for Supplemental Order Regarding Attorney Fees [181], and ORDER that Plaintiff's attorney Robert Mulhern SHALL PAY $14, 789.36 to the appropriate party for Defendants Town of Mountain Village, Ken Brackett and Dale Wood's attorney fees and costs pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. Sec. 1927.

Dated: February 15, 2005.

Filed 6/24/2004

(D.C. No. 02-CV-1116-LTB-CBS.)

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

STEPHEN C. ROTH and JEAN E. GUMESON,
Plaintiffs,

v.

MICHAEL F. GREEN et al

ORDER

I wholly dismissed Plaintiffs' § 1983 case on December 5, 2003, In doing so, I concluded the following; 1) Plaintiffs were not deprived of their Fourth Amendment rights; 2) Plaintiffs ignored controlling 10th Circuit precedents 3) Plaintiffs did not have a good-faith belief that any of the Defendants personally participated in the "ruse" drug checkpoint, required by 42 U.S. C. Sec. 1983; 4) Plaintiff did not allege specific facts showing any agreement or collaboration between Defendants to undertake an improper, illegal, or unconstitutional activity; and 5) Plaintiffs brought claims that were precluded by the Rooker-Feldman doctrine, see District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), and by Heck v. Humphrey, 512 U.S. 477, 486-7 (1994). In other words, Plaintiffs completely failed in their suit against the seventy-six individual and organization defendants.

Upon Plaintiffs' motion for leave to proceed on appeal pursuant to 28 USC Sec. 1915 and Fed. R. App. P. 24, I concluded that "[P]laintiffs have not shown the existence of a reasoned, non-frivolous argument an the law and facts in support of the issues raised on appeal," and held that the appeal was not taken in good faith. Now, various Defendants move for Rule 11 sanctions against Plaintiffs' attorney , Robert Mulhern ("Mulhern"), and awards of attorney fees and costs for which Mulhern would be personally liable pursuant to 28 U. S.C. Sec. 1927. For the following reasons, I grant those motions. Plaintiffs also move for sanctions and attorney fees against Defendants.That motion is denied.

I. Law

A. Rule 11

Federal R. Civ. 11 states in pertinent part:

(b) Representations to Court. By presenting to the court (whether by signing filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, fond after an inquiry reasonable under the circumstances,--
(l) it is not being presented for any improper purpose, such to harass or to cause unnecessary delay or needless increase in the cost of litigation;
(2) the claim , defenses, and other legal contentions therein are warranted by existing law or by a non[-] frivolous argument for the extension, modification. or reversal of existing law or the establishment of new

law;
(3) the allegation and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; ...
(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firm, or parties that have violated subdivision (b) or are responsible for the violation.

"Rule 11 requires sanctions against attorneys who file signed pleadings, motion or other papers in district court which are not well[-]grounded in fact, are not warranted by existing law or a good[-]faith argument for its extension, or are filed for an improper purpose." Adamson v. Bowen, 855 F.2d 668, 672 (10th Cir. 1988). A court may impose sanctions even when the case has been dismissed. See Peterson v. Zimmerman, No. 97-4145, 1997 WL 785500 (10th Cir. 1997) (affirming imposition of sanction against plaintiff after complaint was dismissed).

The imposition of sanctions is committed to the trial court's discretion. See Adamson, 855 F2d at 73. There are six factors I consider before rendering sanctions: "(1) ability to pay sanctions, (2) history of the offender, (3) experience and ability of the offender, (4) severity of the offense,, (5) bad faith, and (6) the chilling effect of the sanction." Merrigan v. Affiliated Bankshares of Colo., Inc., 775 F.Supp. 1408, 1413 (D, Colo. 1991),

"[E]ven onerous conditions" may be imposed upon a

litigant as long as they are designed to assist the district court in curbing the particular abusive behavior invoked. See Carter v. United States, 733 F.2d 735, 737 (10th Cir. 1984), However, sanctions cannot result in total preclusion of the litigant, or present an absolute precondition to future filings. See Cotner v. Hopkins, 795 F. 2d 900, 903 (10th Cir. 1986).

A motion for sanctions must comply with the dictates of Rule 11. Rule 11(c)(1)(A) presides that "[a] rnotion for sanctions... . shall be made separately from other motions or requests...", and "shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper . . is not withdrawn or appropriately corrected." If the movant fails to comply with these procedural prerequisites, the Rule 11 sanction cannot be imposed, See Cooter & Gell v. Hartmarx Corp., 496 U. S. 384, 391 (1990) (interpeting Rule 11 according to its plain meaning); Karara v. Czopek NO. 95-1361,1996 WL 330260 *2 (10th Cir. Jun 6, 1996).

B.28 USC§1217

28U.S.C. § 1927 states Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may he required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

II. Discussion

A. Defendants' Motions

I begin with the motion filed by Colorado Governor Bill Owens and Raymond Slaughter ("State Defendants"). By letter dated January 29, 2003, State Defendants notified Plaintiffs' attorney Mulhern, that Plaintiffs' complaint failed to meet Rule 11(b) standards.

Specifically, State Defendants explained the significance of the 10th Circuit case US. v. Flynn, 309 F.3d 736 (10th Cir. 2002), whose facts are analogous to the ones that were at suit in this case, and which I cited at length in my December 5, 2003 Order as dispositive.

State Defendants requested that if Mulhern disagreed, he should explain how his clients' claims remained viable despite Flynn. Moreover, he was asked to explain how each claim was viable in light of existing law, or was a non-frivolous argument for the extension, modification, or reversal of existing law. Finally, State Defendants clearly set out the requirements under 42 U.S.C. § 1983 for personal participation by defendants, and stated that they believed Plaintiffs provided neither factual support nor had a good-faith belief in such personal participation by State Defendants. Therefore, State Defendants warned Mulhern that the Complaint violated Rules 11(b)(1) and (3). In my December 5, 2003 Order, I held that Plaintiffs lacked either factual support or good-faith relief to support their Sec. 1983 claims.

State Defendants filed their motion for Rule 11 sanctions more than 21 days after the date of their notice letter. Plaintiffs' claims were "not withdrawn or appropriately corrected" within that 21-day period. In fact, Plaintiffs never withdrew their claims. The motion

complies with Rule 11©(1)(A)'s required 21-day "safe-harbor" period.

I conclude that Mulhern's pursuance of Plaintiffs' lawsuit despite numerous-as shown below-Rule 11 "safe-harbor" warnings created unnecessary delay and needlessly increased the cost of this litigation under Rule 11(b)(1). I conclude that "the claims, defenses, and other legal contentions" presented by Plaintiffs in their lawsuit before this Court were not "warranted by existing law or by a non-frivolous argument for the extension, modifications, or reversal of existing law or the establishment of new law" under Rule 11(b)(2). Furthermore, pursuant to Rule 11(b)(3), I conclude that the allegations and other factual contentions contained in Plaintiffs' claims lacked evidentiary support and would not have gained evidentiary support after further investigation or discovery.

Of the six factors I consider under Rule 11, see Merrigan, 775 F. Supp. At 1413, I conclude the following. I have no information on Mulhern's ability to pay sanctions. I also do not know Mulhern's history, experience, or ability. However, I consider his offense sever in terms of wasted time and wasted money. Moreover, despite many opportunities to change his conduct-including a failed appeal in the Colorado Court of Appeals, and the Rule 11 safe-harbor letter here-Mulhern failed to do so. Therefore, while Mulhern might consider his litigation conduct ambitious, I conclude he acted in bad faith. Finally, I do not foresee my ruling creating a chilling effect. In contrast, my ruling should act as a warning to others who contemplate filing frivolous lawsuits against multiple defendants who are clearly not liable. Therefore, I

conclude that Rule 11 sanctions are appropriate.

State Defendants move in conjunction with Rule 11 for attorney fees and costs under 28 U.S.C. Sec. 1927. I conclude that charging fees and costs personally to Plaintiffs' attorney Mulhern is appropriate. In suing twenty-six named Defendants and Does 1-50, Mulhern engaged in shotgun litigation, and ignored the realities of the Defendants' non-involvement in the circumstances applicable to his clients. I conclude that Mulhern unreasonably and vexatiously multiplied the Defendants in this case, thereby recklessly increasing the amount of attorney and paralegal time spent on litigation, and the costs associated therewith.

Defendants who clearly had no liability under the circumstances were forced to obtain counsel and defend against specious claims. Mulhern refused to withdraw claims or dismiss various Defendants against whom claims could not be maintained. For that reason, coupled with the need for Rule 11 sanctions, I conclude that Mulhern should be personally liable for the fees and costs associated with State Defendants' defense under Sec. 1927.

State Defendants submit affidavits detailing the attorney and paralegal fees incurred in their defense of Plaintiffs' unsupported claims. The total amount due in attorney fees is $14325.00. The total amount due The total amount due for paralegal services is $562.50. Upon my review of the affidavits, I conclude that the rates and hours logged are reasonable. Therefore, I conclude that Mr. Mulhern is liable in the total amount of $14887.50.

Defendants Town of Mountain Village, Ken Brackett and dale Wood ("Mountain Village Defendants") wrote a Rule 11 notice and "safe-harbor" letter on February 27, 2003, and sent it to Mulhern. In it, they also explained the dispositive nature of Flynn and the personal-participation requirement of 42 U.S.C. Sec. 1983. Plaintiffs failed to withdraw their claims. For the reasons I state with regard to the State Defendants, I conclude that Rule 11 sanctions against Mulhern are warranted. I also conclude that Mulhern is personally liable for attorney fees and costs associated with vexaciously multiplying the proceedings under 28 U.S.C. Sec. 1927. Mountain Village Defendants have not submitted affidavits to detail attorney fees and costs. I hold in abeyance my specific conclusion as to what Mulhern owes Mountain Village Defendants until such affidavits are submitted.

Defendants Matt Buffington, Tim Rowell, Tom Halper, Mike Meuer, Sheriff Sydney "Duke" Schirard, Sheriff Jerry Martin, and the Boards of County Commissioners for the Counties of Dolores and La Plata ("Buffington Defendants") sent a Rule 11 letter dated September 15 ,2003 to Mulhern. The Buffington Defendants explained Flynn's application as well. Plaintiffs failed to withdraw their claims. For the reasons I stated with regard to the State Defendants, I conclude Rule 11 sanctions are proper, and that Mulhern is personally liable for attorney fees and costs associated with the Buffington Defendants under 28 U.S.C. Sec. 1927. An affidavit attached to the Buffington Defendants' motion describes attorney fees of $15,995,75, and costs amounting to $1,513.75, for a total of $17,509.50. I hold that Mulhern is personally responsible for this amount.

Defendants the City of Durango, Al Bell and Jeff Copeland ("Durango Defendants") also warned Mulhern in their Rule 11 letter dated February 3, 2003. That letter details Flynn's application, and the need for- and lack of- personal participation by Defendants. Plaintiffs did not withdraw their claims. For the reasons I gave regarding the State Defendants, Rule 11 sanctions are proper, and Mulhern is personally responsible for attorney fees and costs associated with recklessly multiplying the defendants in this case. The Durango Defendants, by affidavit, seek a total of $15, 752.54 In attorney fees and costs. Finding the amount reasonable, I award it.

Defendants Michael Green, Joey Chavez, Sam Hager, Brooks Bennett, Hugh Richards, and the Board of County Commissioners of Montezuma County ("Montezuma Defendants") notified Mulhern by Rule 11 letter dated August 15, 2003. It cited both Flynn and People v. Roth, the Colorado Court of Appeals decision that is directly contrary to the consitutional claims asserted by Plaintiffs. Plaintiffs ignored the letter . For the reasons stated with regard to the State Defendants, Rule 11 sanctions are proper, and Mulhern shall pay the Montezuma Defendants' attorney fees and costs. By affidabvit, they request a total of $15,669.56 in fees and costs. Finding that amount reasonable, I award it.

Finally, Defendants City of Cortez, Dennis Spruell, Danny Dufur, and Roy Lane ("Cortez Defendants") sent their Rule 11 warning letter on February 3, 2003. They cited Flynn and referenced the State Defendants' letter. Plaintiffs failed to respond or withdraw their claims. For the reasons state above, Rule 11 sanctions are roper, and Mulhern shall pay the Cortez

Defendants' attorney fees and costs. By affidavit, the Cortez Defendants request a total of $13436.31 in fees and costs. Finding he amount reasonable, I award it.

B. Plaintiffs' Motion

Plaintiffs audaciously move for Rule 11 sanctions and attorney fees and costs under 28 U.S.C. Sec. 1927 against all Defendants. Plaintiffs filed this motion after filing their Response to Defendants' multiple motions for sanctions and fees. Accordingly, Defendants then filed responses to this motion. By filing this motion-itself meritless-Plaintiffs have further increased the litigation costs of their fully unsubstantiated lawsuit.

Plaintiffs contend that Defendants did not attempt to confer with Mr. Mulhern before filing their Rule 11 motions, thereby violating Rule 11 and Local Rule 7.1A, see D.C. Colo.L.CivR. 7.1.A. Defendants filed their various warning or "safe-harbor" letters, which satisfactorily notified Plaintiffs and Plaintiffs' counsel of the likelihood of future Rule 11 motions if Plaintiffs did not withdraw their frivolous claims. These letters substantially satisfy both Rule 11 and the local rule.

Plaintiffs also contend that Defendants failed to follow Rule 11 procedure and could not file Rule 11 motions because the case was dismissed. The contentions are wholly and patently without merit. I deny the motion.

ACCORDINGLY, IT IS ORDERED THAT:

1) Defendants Governor Bill Owens and Raymond Slaughter's motion for Rule 11 sanctions and attorney fees and costs under 28 U.S.C. Sec 1927

is GRANTED. PLAINTIFFS' attorney Robert Mulhern SHALL PAY $14,887.50 to the appropriate party for these Defendants' attorney fees and costs;

2) Defendants Town of Mountain Village, Ken Brackett and Dale Wood's motion for Rule 11 sanctions and attorney fees and costs under 28 U.S.C. Sec. 1927 is GRANTED. I HOLD IN ABEYANCE my conclusion re: what attorney Mulhern owes until submission of affidavits detailing attorney fees and costs;

3) Defendants Matt Buffington, Tim rowell, Tom Halper, Mike Meuer, Sheriff Sydney "Duke" Schirard. Sheriff Jerry Martin, and the Boards of County Commissioners for the Counties of Dolores and La Plata's motion for Rule 11 sanctions and attorney fees and costs under 28 U.S.C. Sec. 1927 is GRANTED. PLAINTIFFS' attorney Robert Mulhern SHALL PAY $17,509.50 to the appropriate party for these DEFENDANTS' attorney fees and costs;

4) Defendants the City of Durango, Al Bell, and Jeff Copeland's motion for Rule 11 sanctions and attorney fees and costs under 28 U.S.C. Sec. 1927 is GRANTED. PLAINTIFFS' attorney Robert Mulhern SHALL PAY $15, 752.54 to the appropriate party for these DEFENDANTS' attorney fees and costs;

5) Defendants Michael Green, Joey Chavez, Sam Hager, Brooks Bennett, Hugh Richards, and the

Board of County Commissioners of Montezuma county's motion for Rule 11 sanctions and attorney fees and costs under 28 U.S.C. Sec. 1927 is GRANTED. PLAINTIFFS' attorney Robert Mulhern SHALL PAY $15,669.56 to the appropriate party for these DEFENDANTS' attorney fees and costs;

6) Defendants City of Cotez, Dennis Spruell, Danny Dufur, and Roy Lane's motion for Rule 11 sanctions and attorney fees and costs under 28 U.S.C. Sec 1927 is GRANTED. PLAINTIFFS' attorney Robert Mulhern SHALL PAY $13, 436.31 to the appropriate party for these DEFENDANTS' attorney fees and costs; and

7) PLAINTIFFS' motion for sanctions and fees is DENIED.

No. 05-1129, 05-1272

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STEPHEN C. ROTH and JEAN E. GUMESON,
Plaintiffs,

v.

MICHAEL F. GREEN; DENNIS SPRUELL; MATT BUFFINGTON; BROOKS BENNETT; HUGH RICHARDS; DANNY DUFUR; JEFF COLEMAN; TIM ROWELL; TOM HALPER; MIKE MEUER; KEN BRACKETT; SAM HAGER; ROY C. LANE; JERRY MARTIN; JOEY M. CHAVEZ; AL BELL; SYDNEY DUKE SCHIRARD; DALE WOOD, individually and in their official capacities; CITY OF CORTEZ, a public corporation; CITY OF DURANGO, a public corporation; TOWN OF MOUNTAIN VILLAGE, a public corporation; DOLORES BOARD OF COUNTY COMMISSIONERS, reads as The Board of County Commissioners for the County of Dolores, a public corporation; LA PLATA COUNTY BOARD OF COUNTY COMMISSIONERS, reads as The Board of County Commissioners for the County of La Plata, a public corporation; MONTEZUMA COUNTY, BOARD OF COUNTY COMMISSIONERS, reads as The Board of County Commissioners for the County of Montezuma, a public corporation; BILL OWENS; RAYMOND SLAUGHTER, individually and in their official capacities; and unknown Doe defendants 1 through 50,
Defendants-Appellees.
and

ROBERT J. MULHERN, Attorney-Appellant.
STEPHEN C. ROTH and JEAN E. GUMESON,
Plaintiffs-Appellants,

v.

MICHAEL F. GREEN; DENNIS SPRUELL; MATT BUFFINGTON; BROOKS BENNETT; HUGH RICHARDS; DANNY DUFUR; JEFF COLEMAN; TIM ROWELL; TOM HALPER; MIKE MEUER; KEN BRACKETT; SAM HAGER; ROY C. LANE; JERRY MARTIN; JOEY M. CHAVEZ; AL BELL; SYDNEY DUKE SCHIRARD; DALE WOOD, individually and in their official capacities; CITY OF CORTEZ, a public corporation; CITY OF DURANGO, a public corporation; TOWN OF MOUNTAIN VILLAGE, a public corporation; DOLORES BOARD OF COUNTY COMMISSIONERS, reads as The Board of County Commissioners for the County of Dolores, a public corporation; LA PLATA COUNTY BOARD OF COUNTY COMMISSIONERS, reads as The Board of County Commissioners for the County of La Plata, a public corporation; MONTEZUMA COUNTY, BOARD OF COUNTY COMMISSIONERS, reads as The Board of County Commissioners for the County of Montezuma, a public corporation; BILL OWENS, individually and in his official capacity; RAYMOND SLAUGHTER, individually and in his official capacity; and unknown Doe defendants 1 through 50,
Defendants-Appellees.

ORDER

Filed December 11 , 2006

Appellant's petition for a panel rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court . who are in regular active service. As no member of the panel and too judge in regular active service on the court requested that the court be polled, that petition is also denied,

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

The Constitution of the United States of America

Amendment I

Congress shall make no law ... prohibiting ... the right of the people ... to petition the government for a redress of grievances.

Amendment V

No person shall ... be deprived of life, liberty, or property, without due process of law....

28 USC § 1927. Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 USC § 2071. Rule-making power generally

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.
(b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice

and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.

(c)

(1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.

(2) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.

(d) Copies of rules prescribed under subsection (a) by a district court shall be furnished to the judicial council, and copies of all rules prescribed by a court other than the Supreme Court under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public.

(e) If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.

(f) No rule may be prescribed by a district court other than under this section.

28 USC § 2073. Rules of procedure and evidence; method of prescribing

(a)

(1) The Judicial Conference shall prescribe and publish the procedures for the consideration of proposed rules under this section.

(2) The Judicial Conference may authorize the appointment of committees to assist the Conference by recommending rules to be prescribed under sections 2072 and 2075 of this title. Each such committee shall consist of members of the bench and the professional bar, and trial and appellate judges.

(b) The Judicial Conference shall authorize the appointment of a standing committee on rules of practice, procedure, and evidence under subsection (a) of this section. Such standing committee shall review each recommendation of any other committees so appointed and recommend to the Judicial Conference rules of practice, procedure, and evidence and such changes in rules proposed by a committee appointed under subsection (a)(2) of this section as may be necessary to maintain consistency and otherwise promote the interest of justice.

(c)

(1) Each meeting for the transaction of business under this chapter by any committee appointed under this section shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public, and states the reason for so closing the meeting. Minutes of each meeting for the transaction of business under this chapter shall be maintained by the committee and made available to the public, except that any portion of such minutes, relating to a closed meeting and made available to the public, may contain such deletions as may be necessary to avoid frustrating the purposes of closing the meeting.

(2) Any meeting for the transaction of business under this chapter, by a committee appointed under this

section, shall be preceded by sufficient notice to enable all interested persons to attend.

(d) In making a recommendation under this section or under section 2072 or 2075, the body making that recommendation shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate views.

(e) Failure to comply with this section does not invalidate a rule prescribed under section 2072 or 2075 of this title.

28 USC § 2077. Publication of rules; advisory committees

(a) The rules for the conduct of the business of each court of appeals, including the operating procedures of such court, shall be published. Each court of appeals shall print or cause to be printed necessary copies of the rules. The Judicial Conference shall prescribe the fees for sales of copies under section 1913 of this title, but the Judicial Conference may provide for free distribution of copies to members of the bar of each court and to other interested persons.

(b) Each court, except the Supreme Court, that is authorized to prescribe rules of the conduct of such court's business under section 2071 of this title shall appoint an advisory committee for the study of the rules of practice and internal operating procedures of such court and, in the case of an advisory committee appointed by a court of appeals, of the rules of the judicial council of the circuit. The advisory committee shall make recommendations to the court concerning such rules and procedures. Members of the committee shall serve without compensation, but the Director may

pay travel and transportation expenses in accordance with section 5703 of title 5.

FRCP Rule 83. Rules by District Courts; Judge's Directives

(a) Local Rules.

(1) Each district court, acting by a majority of its district judges, may, after giving appropriate public notice and an opportunity for comment, make and amend rules governing its practice. A local rule shall be consistent with -- but not duplicative of -- Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and 2075, and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments shall, upon their promulgation, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

(2) A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(b) Procedures When There is No Controlling Law

A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.